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# A FEDERAL SUIT AT LAW

*IPM*  
*BY*  
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W. S. SIMKINS

PROFESSOR OF LAW IN THE UNIVERSITY OF TEXAS

ROCHESTER, N. Y.  
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## PREFACE.

THE United States courts are not subordinate to the State courts; they move in an independent judicial system, and though both the State and Federal courts have concurrent jurisdiction in dealing with property rights of the citizens in the different States, yet they derive their powers from different sources. At a very early period it became evident that, in administering the laws of the several States, that there should be conformity in procedure as well as in administering the State rules of property. With the purpose, then, of bringing about general uniformity of procedure in suits at law, and to confer upon litigants in the Federal courts the remedies provided by the various States for their own citizens, Congress passed in 1872 section 914 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 684), known as the "conformity act," and in words as follows: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, *as near as may be*, to the practice, pleadings, and forms and modes of proceeding *existing at the time* in like causes in courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." Very soon after the passage of the act, it was construed by the Supreme Court of the United States to be directory, without any mandatory feature except perhaps that under the act the Federal courts should adhere to the local system designated to produce an issue of law or fact; but even then they will not follow any technical requirements of form, if in the opinion of the judge it would embarrass the administration of justice by doing so. The words "as near as may be" were held to mean not as near as may be possible,

nor as near as may be practicable, but had opened wide the door of discretion; and it is the right and duty of the judges to reject any subordinate provision of the State statutes, and every rule of practice in the State courts which in their judgment will unwiseley encumber the administration of the law, or tend to defeat the ends of justice.

This construction of the act has been the keynote in applying State rules of practice and procedure to cases at law in the Federal courts, and it is my purpose in this work to follow the proceedings in a suit at law in the Federal court from its inception to its final determination, and to point out when the practitioner may rely on the State rules, in the several steps of a suit at law; or, in a word, to show when the Federal courts will conform, and when they will not.

This work is intended as a complement to my *Equity Suit in the Federal courts*, and consequently there will be found repeated references to that work to avoid repetition of those rules of practice and procedure that are as applicable to a suit at law as to a suit in equity; for example, all rules pertaining to Federal jurisdiction, removal of causes, and the taking of depositions when they can be taken in a suit at law.

I offer this book to the profession, deeply grateful for the kind reception given to my *Suit in Equity*, and with the hope they will find in it a solution of any doubt that may arise as to any step necessary in a suit at law in the Federal courts.

W. S. SIMKINS,

Professor of Law in the University of Texas.

Austin, Texas,  
June 19, 1912.

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# A FEDERAL SUIT AT LAW.

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## CHAPTER I.

### A LAWSUIT IN THE FEDERAL COURT.

Prior to 1872 the practice and procedure covering all matters that occur in the progress of a suit at law in which was sought the recovery of money or specific property in the circuit and district courts of the United States were governed by the act of 1793, U. S. Comp. Stat. 1901, p. 685, and embodied in sec. 918, U. S. Rev. Stat., by which the several circuit and district courts of the United States were authorized from time to time to make rules and orders directing the returning of writs and process, the filing of pleadings, the entering and making up of judgments, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delay of proceedings; provided such regulations were not to be inconsistent with any act of Congress or such rules of practice as the Supreme Court should prescribe under authority of section 917, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 684, which in Friedenstein v. United States, 125 U. S. 232, 31 L. ed. 740, 8 Sup. Ct. Rep. 838, was recognized, as authorizing the Supreme Court to prescribe rules of practice in suits at common law as well as in equity. Shepard v. Adams, 168 U. S. 625, 42 L. ed. 604, 18 Sup. Ct. Rep. 214; Amy v. Watertown, 130 U. S. 301, 302, 32 L. ed. 946, 947, 9 Sup. Ct. Rep. 530.

The gradual abandonment of common-law actions by the States, and the adoption by them of practice Codes, required the profession to familiarize themselves with two systems of  
S. S. at L.—1. (1.)

practice in the law courts in the same locality; and the practice in the various districts of the Federal system resting upon the discretion of the courts created such uncertainty and confusion in the proceedings in law that some remedy was necessary to ameliorate at least the conditions then existing.

So June 1, 1872, Congress passed an act generally known as the "conformity" act, designed to bring about uniformity in State and Federal procedure in common-law causes embodied in section 914, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 684, and in words as follows: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform, *as near as may be*, to the practice, pleadings, and forms and modes of proceeding *existing at the time* in like causes in the courts of record of the State within which such circuit or district courts are held, *any rule of court to the contrary notwithstanding.*" Act June 1, 1872. The circuit courts having been eliminated by the judiciary act of 1911, which went into effect January 1, 1912, the act applies, of course, to the district courts only, to which have been transferred all the powers exercised by the circuit courts.

In determining, then, the practice and procedure on the law side of the district courts of the United States, it becomes necessary to discuss section 914, U. S. Rev. Stat., stated above, and to show, if possible, to what extent the Federal judges have considered themselves bound by its provisions in regulating their practice within their several districts, and wherein they have considered themselves bound to conform to the practice of the State in which they were sitting, in like cases.

Again, our inquiry will extend to the exercise of their discretion in adopting the remedies provided by State legislation, which were evidently intended to be conferred on suitors in the Federal courts by enacting sections 914-916, of U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 684.

Section 915 provides that in common-law causes in the circuit and district courts, the plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant, *which are now provided* by the laws of the State in which such courts are held, for the courts

thereof; and such courts may from time to time, by general rules, adopt such State laws as may be in force in the States in which they are held, in relation to attachments and other process: Provided, That similar preliminary affidavits, or proofs, and similar security, as required by such State laws, shall be furnished by the party seeking the attachment, or other remedy. Act June 1, 1872. (See Attachments.)

Section 916 provides that "the party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution, or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such circuit or district courts; and such courts may from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise." Act June 1, 1872. (See Judgments.)

It is clearly apparent by this act of 1872 Congress was endeavoring to remove the chaotic conditions in Federal practice and procedure (Nudd v. Burrows, 91 U. S. 441, 23 L. ed. 290), and to bring about "as near as may be" some uniformity in State and Federal practice, by fixing the State practice as a standard to which their changes of practice must conform, in similar civil causes. But the law was in effect a mere suggestion, as the use of the words "as near as may be" meant simply, do it if desirable, and was intended to leave entire discretion in the Federal judges as to what they should adopt, follow, or assimilate in the State practice and procedure, or whether they should adopt any part of it. So the bar in any State are still left in doubt as to what is the proper practice on the law side of the Federal courts, for in following State methods they may at any time come in conflict with the court's discretion. However this may be, the enactment has not been without salutary and beneficial effect. It has resulted in abolishing the different forms of common-law actions, and in adopting at least the forms and order of pleading provided by the States in which the Federal courts are sitting.

Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 300, 23 L. ed. 901; Barnet v. Muncie Nat. Bank, 98 U. S. 558, 25 L. ed. 212.

The cases just cited were among the earliest cases construing section 914 after its passage and the effect of the words "as near as may be," and the Supreme Court then, and has since, emphasized the scope of Federal discretion by declaring that the words did not mean as near as may be possible, or as near as may be practicable, but they meant as near as may be necessary in the judgment of the court to advance the ends of justice in the case at bar, or prevent delay in the proceedings. O'Connell v. Reed, 5 C. C. A. 586, 12 U. S. App. 369, 56 Fed. 538, quoting Mexican C. R. Co. v. Pinkney, 149 U. S. 205, 206, 37 L. ed. 703, 704, 13 Sup. Ct. Rep. 859; Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; Van Doren v. Pennsylvania R. Co. 35 C. C. A. 282, 93 Fed. 269.

It has been frequently said that the words were intended to qualify any mandatory features of the act, and that it was the right and duty of the Federal courts to reject any subordinate provisions of the State statutes, or any rule of their practice which in their judgment would unwisely encumber the administration of the law, or tend to defeat the ends of justice in their courts. Kent v. Bay State Gas Co. 93 Fed. 889, 890.

Again, it is said in Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214, that while it was the intention of Congress to bring about a general uniformity in Federal and State practice in civil cases on the law side of the court, and to confer the advantages of State remedial legislation on litigants in its courts, yet it was clearly intended to reach that uniformity through the discretion of the Federal judges, who are authorized to regulate their own practice. Therefore they may neither adopt nor apply State rules if not considered necessary, nor if considered inconvenient for the advancement of justice or the prevention of delay. Hein v. Westinghouse Air Brake Co. 164 Fed. 79; Id. 168 Fed. 766, 769; Swift & Co. v. Jones, 76 C. C. A. 253, 145 Fed. 492.

In Hein v. Westinghouse, *supra*, p. 769, it is stated that

section 914 must be construed to mean that the practice must conform, except—

(1) As to matters covered by congressional legislation (*Swift & Co. v. Jones*, 76 C. C. A. 253, 145 Fed. 492; *Ex parte Fisk*, 113 U. S. 713-721, 28 L. ed. 1117-1120, 5 Sup. Ct. Rep. 724); matters of jurisdiction (*Southern P. Co. v. Denton*, 146 U. S. 209, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; *Shumaker v. Security Life & Annuity Co.* 86 C. C. A. 302, 159 Fed. 113); substituted service of process; charging juries (*Nudd v. Burrows*, 91 U. S. 441, 23 L. ed. 286; *St. Louis, I. M. & S. R. Co. v. Vickers*, 122 U. S. 363, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1126); matters relating to the personal administration of the judge (*Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 372, and cases cited; *Nudd v. Burrows*, 91 U. S. 442, 23 L. ed. 290); joinder of equitable and legal causes of action; and actions *in rem* (*Coffy v. United States*, 117 U. S. 235, 29 L. ed. 891, 6 Sup. Ct. Rep. 717).

(2) The Federal courts may change any subordinate provision of the State law which they may deem unsuited to their procedure.

(3) They may reject subordinate provisions of the State law governing practice and pleadings, or procedure, or forms which tend to obstruct the administration of justice (*St. Charles v. Stookey*, 85 C. C. A. 494, 154 Fed. 778, 779; *Phenix Ins. Co. v. Charleston Bridge Co.* 13 C. C. A. 58, 25 U. S. App. 190, 65 Fed. 632; *Lange v. Union R. Co.* 62 C. C. A. 48, 126 Fed. 340).

This leaves probably the simple duty of the Federal courts to adhere to the local system designed to produce the issues of law and fact; in a word, the method and order of pleading. *Shumaker v. Security Life & Annuity Co.* 86 C. C. A. 302, 159 Fed. 112, 113; *Brown v. Cumberland Teleph. & Teleg. Co.* 181 Fed. 246; *Saunders v. Short*, 30 C. C. A. 462, 58 U. S. App. 689, 86 Fed. 229; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 300, 23 L. ed. 898; *Southern P. Co. v. Denton*, 146 U. S. 209, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; *Roberts v. Lewis*, 144 U. S. 656, 657, 36 L. ed. 582, 12 Sup. Ct. Rep. 781; *Merrill v. Rokes*, 4 C. C. A. 433, 12 U. S. App. 183, 54 Fed. 452.

*Scope of Power to Make Rules of Practice and Procedure, or Follow Those Made.*

The quasi legislative power of the courts to make rules governing their practice and procedure, whatever effect such rules may have in the prosecution of the suit or the vindication of the right sought, has been frequently held to be a constitutional or procedure, or to follow one established by State authority, a statutory enactment. We see this power is only limited by the phrase "as near as may be," which, as said, means as near as may be consistent with the ends of justice, and effective in the opinion of the court to prevent delay.

A Federal court may not only establish a rule of practice when no rule exists in the State or Federal courts, but may, independently of any State law or rule, establish its own rules touching the same matter of practice or procedure, so long as the rule thus established is not inconsistent with an act of Congress or a rule established by a superior court. Any rule thus made by these courts may be safely followed without reference to State laws or rules, because it will always be assumed by the appellate court that the rule, though in conflict with State practice or procedure, was the exercise of discretion under the phrase "as near as may be." *Shepard v. Adams*, 168 U. S. 627, 42 L. ed. 605, 18 Sup. Ct. Rep. 214.

The scope of the power either to establish a rule of practice or procedure, or to follow one established by State authority, has no definite measure; we can only seek the proper practice in precedents established in similar cases; and even then discovered precedents are no infallible guides, though they may be persuasive. Though there may be no Federal rule, the practitioner assumes a risk in following the State rule, however clear and decisive in its directions, for the Federal judge may decline to follow it, because not consistent with his views of justice in the particular case.

While authorities have been conflicting, yet I think what has been said will be apparent in the progress of this work.

It will be observed that section 914, U. S. Comp. Stat. 1901, p. 684, under discussion, requires conformity to State rules as to pleadings, practice, forms and modes of proceeding *exist-*

*ing at the time* in courts of record of the State in which the Federal court is sitting, *any rule of court to the contrary notwithstanding*. The question has occasionally arisen, Would any change in a State rule be operative forthwith in a trial of a cause at law brought in a Federal court after such change? Are the words, "any rule of court to the contrary notwithstanding," mandatory, and do they abrogate any conflicting Federal rule? It may be answered by considering that section 914 only requires the court to adopt or follow, "as near as may be," the practice, pleadings, etc., of the State courts, and therefore, whether they adopt or ignore the State rule, it would only be the exercise of a given discretion from which no redress by appeal would lie. As said above, whether there be a State rule or not, the power to establish one in the particular case, independent of State procedure, is exercised frequently. As has often been decided, section 914 must be construed with section 918. *Ewing v. Burnham*, 74 Fed. 385; *Osborne v. Detroit*, 28 Fed. 385; *Importers & T. Nat. Bank v. Lyons*, 134 Fed. 512; *Van Doren v. Pennsylvania R. Co.* 35 C. C. A. 282, 93 Fed. 261.

Again, State laws or rules have no force unless adopted by Congress as in the earlier process acts of 1789, 1792, and 1828, or by the courts. In *Erstein v. Rothschild*, 22 Fed. 61, it is said it was not the intention of Congress to place the practice in the Federal courts under the control of State legislation, and thereby make them, as to their practice and procedure, subordinate State courts. To make a State rule effective in practice in the Federal courts, it must be adopted as such by congressional act, or by an order of the court.

Again, it may be stated that even when adopted by either congressional act or by order of the courts, the latter do not feel themselves bound by the decisions of the State courts in construing or applying the rule. *Erstein v. Rothschild*, 22 Fed. 64; *Wall v. Chesapeake & O. R. Co.* 37 C. C. A. 129, 95 Fed. 398; *Van Doren v. Pennsylvania R. Co.* 35 C. C. A. 282, 93 Fed. 261.

In this uncertainty, may it not be asked why a national code of practice cannot be formulated for the law side as well as the equity side of the court? A code looking to simplicity in plead-

ing, and with the view of an expeditious termination of litigation, and especially "forbidding judgments to be set aside or new trials granted on the ground of technical error as to pleading, or procedure, or the misdirection of the jury, or improper admission or rejection of evidence, unless in the opinion of the court, after examination of the *whole case*, it appears that error complained of has injuriously affected the substantial rights of the parties." I believe that a simple national code embodying these features would soon be adopted by the States at least "as near as may be," and would bring about a practical degree of uniformity in the State and Federal practice much more expeditiously than the vague, uncertain conditions now existing, and which must always exist as long as the practice rests upon the simple discretion of the Federal judges.

## CHAPTER II.

### JURISDICTION.

I have discussed in my *Suit in Equity* in the Federal courts, 2d ed. with practical fullness the jurisdiction of the Federal courts: 1st, As to the legal as distinguished from the equitable, 2d, as to Federal as distinguished from State jurisdiction; and I do not deem it necessary to repeat what was there said, as this work, "A Suit at Law in Federal Courts," as stated in the preface, is only intended as a complement to the former work.

Section 723, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 583, providing that if the remedy at law is plain, adequate, and complete, the equity courts *shall not* take jurisdiction, has been thoroughly construed and illustrated in the former work (Simkins, *Federal Equity Suit*, 2d ed. pp. 11-34). As to Federal as distinguished from State jurisdiction, beginning with p. 35 to p. 222 of my *Suit in Equity*, 2d ed., covering thirty-two chapters, you will find every phase of the Constitution and laws of the United States touching the jurisdiction of the Federal courts discussed with reasonable accuracy, to which is added such changes as have been made by the New Judicial Code that went into effect January 1, 1912.

### *The Jurisdiction Limited.*

The jurisdiction of the Federal courts being limited the presumption is against the jurisdiction (Simkins, *Federal Equity Suit*, 2d ed. pp. 44-47); consequently the petition, bill, or complaint must affirmatively show that the court has jurisdiction, whether it rests upon "a Federal question," "diversity of citizenship," or between citizens of a State and foreign citizens or subjects (Simkins, *Suit in Equity*, 2d ed. 271). Again in drawing your petition, one must take account of the "territorial jurisdiction" of the Federal courts, which is fully explained in chapters 15 to 20 of my *Suit in Equity*. Also see p. 270, 2d ed.

Where the jurisdiction depends on "diversity of citizenship," you will find in chapters 9 to 15 of Simkins Federal Equity Suit, 2d ed. all that is essential to be known in order to plead intelligently.

Where the jurisdiction depends on a "Federal question," you will find a satisfactory discussion of it in chapters 24 to 30.

Where jurisdiction depends on "alienage," you will find a sufficiently accurate discussion on pages 85 to 88 inclusive.

Where the jurisdiction falls within section 8 of the act of 1875, embodied in sec. 57, chap. 4, of the New Code, you will find the practice thereunder fully explained, with forms given, in chapter 58 of Simkins, Federal Equity Suit, 2d ed.

Where the jurisdiction depends on "amount" involved, you are referred to chapters 30 to 34 for the law applicable to this element of Federal jurisdiction.

Where the various grounds of jurisdiction as above set forth are contested, you will find the practice and forms given in my Suit in Equity, 2d ed., as follows:

As to diversity of citizenship, chapter 22.

As to district of suit and venue, chapter 23.

As to Federal question, pp. 166 to 168 inclusive.

As to amount, see chapters 35 and 36.

#### *Amendment of Jurisdictional Averments.*

As to amendment of these jurisdictional averments, see my Suit in Equity, chapter 37, 2d ed.

*Jurisdiction in Probate Matters* (see Simkins, Federal Equity Suit, 2d ed. pp. 245 et seq.). May establish claims against the estate. Farmers' Bank v. Wright, 158 Fed. 841. See American Baptist Home Mission Soc. v. Stewart, 192 Fed. 976.

*Jurisdiction by Assignment.* I have given in chapters 38 and 39 an historical sketch of this character of jurisdiction, and the law as it exists at present. The term "choses in action" is fully construed and illustrated, and when an assignee of a note or bond or evidence of indebtedness can sue in the Federal courts is stated. See chapter 39. Also how the assignment should be alleged in the complaint or petition, and how the issue is raised and tried, with forms given for raising the issue, Simkins, Federal Equity Suit, 2d ed. pp. 220, 221.

## CHAPTER III.

### THE PLEADINGS.

Assuming the jurisdiction of the court, which must rest on one of the grounds above stated with proper amount involved, I will now take up the successive steps in the prosecution of a suit at law in the Federal courts from the filing of the petition to its final determination in the court of last resort.

We have seen that section 914, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 684, known as the "conformity act," requires the forms and *order* of pleading in the State courts of the State in which the Federal courts are sitting to be followed "as near as may be," and in this respect section 914 has been generally considered mandatory by the Federal courts (Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 300, 23 L. ed. 898; Shumaker v. Security Life & Annuity Co. 86 C. C. A. 302, 159 Fed. 112; Brown v. Cumberland Teleph. & Teleg. Co. 181 Fed. 246; Southern P. Co. v. Denton, 146 U. S. 209, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; Knight v. Illinois C. R. Co. 103 C. C. A. 514, 180 Fed. 368); and under this rule may be placed the scope and sufficiency of the pleadings (Knight v. Illinois C. R. Co. 103 C. C. A. 514, 180 Fed. 372; Bryson v. Gallo, 103 C. C. A. 424, 180 Fed. 71-74 and cases cited); and the time of pleading (Ricard v. New Providence, 5 Fed. 433; Werthein v. Continental R. & Trust Co. 20 Blatchf. 508, 11 Fed. 689, see Osborne v. Detroit, 28 Fed. 386).

It will be noticed that section 914 excludes from its operation Suits in Equity or Admiralty. The blended system of pleading in many of the States cannot be followed, wherein legal and equitable causes of action are permitted to be set up in the suit. The distinction between law and equity in the Federal courts is one of substance, and not of form, and this must be kept in mind in framing the pleadings on the law side. McKemy v. Supreme Lodge, A. O. U. W. 104 C. C. A. 117, 180 Fed. 961; Lindsay v. First Nat. Bank, 156 U. S. 485, 39 L. ed. 505, 15 Sup. Ct. Rep. 472; Courtney v. Pradt, 87 C. C. A. 463, 160 Fed. 562;

Bennett v. Butterworth, 11 How. 669, 13 L. ed. 859. See "What Equitable Pleas can be Plead on the Law Side" for authorities. With the understanding, then, that in drawing the pleadings on the law side there must be no confounding or combining legal and equitable cause of action (New Orleans v. Louisiana Constr. Co. 129 U. S. 46, 32 L. ed. 607, 9 Sup. Ct. Rep. 223; Swift & Co. v. Jones, 76 C. C. A. 253, 145 Fed. 491; Cook v. Foley, 81 C. C. A. 237, 152 Fed. 41; Pacific Mut. L. Ins. Co. v. Webb, 84 C. C. A. 603, 157 Fed. 155, 13 Ann. Cas. 752; Mead v. Chesbrough Bldg. Co. 81 C. C. A. 184-192, 151 Fed. 998) we will now pass to the discussion.

### *Petition.*

The petition of course should be a succinct statement of the plaintiff's case; its component parts showing first, jurisdiction in the Federal court, both as to parties and subject-matter; second, the facts entitling plaintiff to relief; third, that the claim set up is legal as distinguished from an equitable right (Simkins, Federal Equity Suit, 2d ed., "The Bill"). What I wish to particularly emphasize is the care that must be taken in stating jurisdiction, and that the cause of action is of legal cognizance.

The pleader in going into a Federal court has two conditions to consider, affecting his right to recover there, which do not arise in the State court. First, he must consider Federal as distinguished from State jurisdiction, and, second, equitable as distinguished from legal. Simkins, Federal Equity Suit, 2d ed., p. 35. In invoking the jurisdiction of Federal courts, it is necessary on the law side, as well as in equity, to consider two conditions in determining jurisdiction:

First, the legal as distinguished from the equitable.

Second, the Federal as distinguished from the State jurisdiction.

As to the first condition, it will be seen hereafter that only legal causes of action can be enforced on the law side of the Federal courts; and the distinction between legal and equitable causes of action is one of substance, and not of form, and the Federal courts have refused to recognize any change made

by the statutes of the various States in blending legal and equitable causes of action in the same suit. (See Simkins, *Federal Equity Suit*, 2d ed. *Remedy at Law*, pp. 15 et seq. for discussion and illustration.)

As to the second condition, art. 3, sec. 1 of the Federal Constitution, vests the judicial power in one Supreme Court and such other inferior courts as Congress may establish. Sec. 2 of art. 3 extends the Federal judicial power to all cases in law or equity where arise controversies between citizens of different States, also between citizens of a State and aliens; also to controversies in which the United States is a party; and to all cases in law and equity arising under the Constitution and laws of the United States and treaties made or which shall be made under their authority. Under this reservation of judicial power in the Constitution, Congress has passed many acts in pursuance thereof, creating circuit and district courts and distributing the power thus granted, and finally, in 1911, passed a New Judicial Code, abolishing circuit courts and transferring the jurisdiction to district courts, and further limiting the jurisdiction of the Federal courts by increasing the amount that must be in issue to give jurisdiction from two thousand dollars, exclusive of interest and costs, to an amount in excess of three thousand dollars, exclusive of interest and costs; which act went into effect January 1, 1912. Section 24 of said act embodies in 25 clauses the jurisdiction of the Federal district courts. (See Simkins, *Federal Equity Suit*, 2d ed., pp. 892 to 895, for the jurisdictional act of 1911, and pp. 40 and 41 for the jurisdictional act of 1888.)

We see, then, by force of the Constitution reserving the power to create a Federal judicial system, and the acts of Congress creating the system and distributing the judicial power among the several courts created, that the jurisdiction of the Federal courts is limited, and not a general jurisdiction. That the basis of its jurisdiction at law over property rights, with which alone this work is concerned, is limited either to suits at law depending on diversity of citizenship, or the existence of a Federal question, and where the amount to be recovered or value involved is in excess of three thousand dollars, exclusive of interest and costs; and within these limitations the United

States courts determine for themselves their jurisdiction. *Starr v. Chicago, R. I. & P. R. Co.* 110 Fed. 6, and cases cited; *Miller v. Rickey*, 146 Fed. 587.

The jurisdiction, then, being limited as to the residence and citizenship of parties, and the amount or value involved, or to the fact that the suit arises under the Constitution and laws of the United States or treaties made or to be made, and the amount and value involved, which in either case must exceed the sum of three thousand dollars, exclusive of interest and costs, the jurisdiction must appear by direct allegations in the petition or declaration. If dependent on diversity of citizenship, the names, places of abode, and citizenship of all parties plaintiffs and defendants must be stated (see Simkins, Federal Equity Suit, 2d ed. p. 267, for form; also for form in case suit is brought by or against a corporation). It must be remembered that *citizenship*, not residence, determines jurisdiction.

If jurisdiction depends on a Federal question, it must appear in the plaintiff's statement of his claim, that is, in the plain, logical statement of plaintiff's case (see Simkins, Federal Equity Suit, 2d ed. p. 152). There can be no presumption of jurisdiction, nor can it be inferred nor stated argumentatively (see Simkins, Federal Equity Suit, 2d ed. p. 44). As to how the jurisdictional amount must be alleged, see Simkins, Federal Equity Suit, 2d ed. pp. 196-276.

#### *Statement of the Case.*

Having seen how jurisdiction must be alleged, we must now look at the statement of the case.

The petition or declaration must state facts of a probative character, and not conclusions. *Chambers v. First Nat. Bank*, 144 Fed. 717; *Nester v. Diamond Match Co.* 74 C. C. A. 266, 143 Fed. 72; *American Cereal Co. v. Western Assur. Co.* 148 Fed. 77; *Groton Bridge & Mfg. Co. v. American Bridge Co.* 151 Fed. 872; *Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 372; *Muser v. Robertson*, 21 Blatchf. 368, 17 Fed. 502; *Shea v. Nilima*, 66 C. C. A. 263, 133 Fed. 209.

Thus a mere allegation of fraud without stating the facts would not be sufficient. *Schell v. Alston Mfg. Co.* 149 Fed.

439. The petition or declaration should show, as required in all forums, the relation between the plaintiff and defendant; a duty to be discharged; the failure of defendant to discharge the duty, and the resulting injury from the failure. The facts must be so stated that the court may say that if proven a good cause of action will be established. With this general formula as a guide, the petition or declaration should conform to the requirements of State laws, rules, and decisions. Thus, in ejectment, where, by State laws, deeds and other written instruments, evidence of title on which the plaintiff relies, are required to be filed with the petition, the Federal courts will enforce the statutory rule. *Alexander v. Gordon*, 41 C. C. A. 28, 101 Fed. 91; *Vance v. W. A. Vandercook Co.* 170 U. S. 472, 473, 42 L. ed. 1112, 1113, 18 Sup. Ct. Rep. 645; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 300, 23 L. ed. 901.

The petition should show that its object is to recover money or specific real or personal property. *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *South Penn Oil Co. v. Miller*, 99 C. C. A. 305, 175 Fed. 735.

As only legal rights can be enforced on the law side, regardless of State statutes (*Beatty v. Wilson*, 161 Fed. 453), a specific averment will control a general averment on the same subject (*Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 650).

### *Joinder of Causes of Action.*

Whatever *legal causes of action* may be joined under State laws and practice may be joined in the Federal courts (*Ohman v. New York*, 168 Fed. 961 and cases cited; *Anglo-American Land & Agency Co. v. Wood*, 143 Fed. 683; *M. T. Mollison Co. v. O'Brien*, 188 Fed. 539); but each cause of action must be stated separately, and be sufficient in itself (*Moore Bros. Glass Co. v. Drevet Mfg. Co.* 154 Fed. 737). The prohibition in the Federal courts is against joining legal and equitable causes of action, whatever may be the State law, rule, or practice, as heretofore stated. *Bruce v. Murray*, 59 C. C. A. 494, 123 Fed. 366; *American Creosote Works v. C. Lembecke & Co.* 165 Fed. 812 and cases cited; *Armstrong Cork Co. v. Merchants' Refrigerating Co.* 107 C. C. A. 93, 184 Fed. 199; *Cook v. Foley*,

81 C. C. A. 237, 152 Fed. 41; Mead v. Chesbrough Bldg. Co.  
81 C. C. A. 184, 151 Fed. 1002; Chapman v. Yellow Poplar  
Lumber Co. 74 C. C. A. 331, 143 Fed. 201.

*Misjoinder of Causes of Action.*

The practice is controlled by the rules and laws of the State, so far as misjoinder in actions at law is concerned. Merchants' Ins. Co. v. Buckner, 49 C. C. A. 80, 110 Fed. 347. See Holt v. Bergevin, 60 Fed. 1.

## CHAPTER IV.

### PARTIES TO A SUIT AT LAW.

#### *Plaintiff.*

The rule is that actions must be brought in the name of the party whose legal right has been invaded, but where the State prescribes who shall be made parties plaintiff or defendant in any cause cognizable at law, the Federal courts will conform to the State Code or rule, unless, as we shall see, the jurisdiction of the court would be ousted by making parties to the suit persons who are only proper, or necessary, and not indispensable parties. Erstein v. Rothschild, 22 Fed. 64; Allnut v. Lancaster, 76 Fed. 131; Perry v. Mechanics' Mut. Ins. Co. 11 Fed. 479; Morning Journal Asso. v. Smith, 4 C. C. A. 8, 1 U. S. App. 270, 56 Fed. 141; Phelps v. Oaks, 117 U. S. 241, 29 L. ed. 890, 6 Sup. Ct. Rep. 714; New York Continental Jewell Filtration Co. v. Sullivan, 111 Fed. 181.

In determining in whom the legal interest is vested, to entitle one to sue, it may be either the general or special owner. Inman v. Seaboard Air Line R. Co. 159 Fed. 973. But, as said in Hale v. Tyler, 104 Fed. 761, U. S. Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684, applies with full force in making parties, so that State laws on the subject are controlling,—citing Pritchard v. Norton, 106 U. S. 124–130, 27 L. ed. 104–106, 1 Sup. Ct. Rep. 102; and Albany & R. Iron & Steel Co. v. Lundberg, 121 U. S. 451, 30 L. ed. 982, 7 Sup. Ct. Rep. 958.

#### *Parties as Affecting Jurisdiction.*

In considering parties as affecting the jurisdiction of the Federal courts, only the absence of *indispensable* parties is considered. O'Neil v. Wolcott Min. Co. 27 L.R.A.(N.S.) 200, 98 C. C. A. 309, 174 Fed. 536, and cases cited (see Simkins, Federal Equity Suit, 2d ed. pp. 231–235).

*Assignees as Parties.*

Suit by assignees, when permitted or forbidden by State laws, will be allowed by the Federal courts. *Greensboro v. Southern Paving & Constr. Co.* 94 C. C. A. 292, 168 Fed. 880; *Nederland L. Ins. Co. v. Hall*, 27 C. C. A. 390, 55 U. S. App. 598, 84 Fed. 278; *Joseph Dixon Crucible Co. v. Paul*, 93 C. C. A. 204, 167 Fed. 784; *Delaware County v. Diebold Safe & Lock Co.* 133 U. S. 488, 33 L. ed. 680, 10 Sup. Ct. Rep. 399, and cases cited; *Pritchard v. Norton*, 106 U. S. 124, 130, 27 L. ed. 104, 106, 1 Sup. Ct. Rep. 102; *Franklin v. Conrad-Stanford Co.* 70 C. C. A. 171, 137 Fed. 737. For jurisdiction by assignment, see *Simkins, Federal Equity Suit*, 2d ed. chapters 38 and 39.

Assignment of causes of action for tort is governed by State laws as to right to sue. *Hartford F. Ins. Co. v. Erie R. Co.* 172 Fed. 899. The foregoing cases show that it is a question of procedure dependent on State laws (*Edmunds v. Illinois C. R. Co.* 80 Fed. 78; *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790, 12 Sup. Ct. Rep. 914); but assignees of choses in action cannot sue in the Federal courts unless the assignor could. *Simkins, Federal Equity Suit*, 2d ed. chapters 38 and 39. The assignee of a part of a chose in action cannot maintain a suit at law upon it in the Federal courts. *Rogers v. Penobscot Min. Co.* 83 C. C. A. 380, 154 Fed. 606.

Congress has set limitations to suits by assignees by forbidding Federal courts to take jurisdiction "to recover the contents of any promissory notes, or other choses in action, in favor of any assignee unless a suit might have been brought or prosecuted in the Federal courts by the assignor, except in cases of foreign bills of exchange." The above restriction was embodied in the act of 1789; it was subsequently amended in the jurisdictional act of 1888, and as amended is now embodied in the New Judicial Code, which went into effect January 1, 1912, sec. 24, and now reads as follows:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be made payable to bear-

*er, and be not made by any corporation,* unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made." This statute has been fully discussed and illustrated in Simkins, Federal Equity Suit, 2d ed.

*Executors and Administrators.*

For jurisdictional purposes, the citizenship of executors and administrators governs when jurisdiction rests upon diversity of citizenship, and not the citizenship of the deceased testator or intestate. This is true also of all suits by representative parties. *Bogue v. Chicago, B. & Q. R. Co.* 193 Fed. 729; *Bishop v. Boston & M. R. Co.* 117 Fed. 771; *Cincinnati, H. & D. R. Co. v. Thiebaud*, 52 C. C. A. 538, 114 Fed. 918; *Schneider v. Eldredge*, 125 Fed. 640; *Jack v. Williams*, 113 Fed. 823; *Mexican C. R. Co. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; Simkins, Federal Equity Suit, 2d ed. p. 36. Where appointed in another State, they cannot maintain an action without taking out ancillary letters in the State where the suit is brought, unless the State Code or laws permit them to sue in their courts without taking out ancillary letters. *J. B. & J. M. Cornell Co. v. Ward*, 93 C. C. A. 473, 168 Fed. 51, 52 and cases cited; *Moore v. Petty*, 68 C. C. A. 306, 135 Fed. 672 and cases cited. Nor can a suit be instituted against an executor or administrator in a Federal court in a State other than the State in which the administration is pending. So, a pending suit against the testator cannot be revived against his executor without taking out ancillary letters. *Lawrence v. Southern P. Co.* 177 Fed. 547; *Filer & S. Co. v. Rainey*, 120 Fed. 718; *Lewis v. Parrish*, 53 C. C. A. 77, 115 Fed. 285; *Skiff v. White*, 127 Fed. 175.

By sec. 955, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 697, where either of the parties plaintiff or defendant dies before final judgment, if the cause of action survives the executor or administrator of such deceased person may prosecute or defend the suit, but such representative party is entitled to a continuance for the term. This section has been construed to refer to personal, and not real, actions. The revival of real actions is

controlled by State laws. *Currell v. Villars*, 72 Fed. 332, and cases cited; *Shute v. Patterson*, 78 C. C. A. 75, 147 Fed. 509, 510; *McArthur v. Williamson*, 45 Fed. 154. In construing this section in *Spaeth v. Sells*, 176 Fed. 798, it was held not to aid the method of revival, which must be controlled by the laws of the State in which the suit is pending. *Green v. Barrett*, 123 Fed. 349; *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387; *Shute v. Patterson*, 78 C. C. A. 75, 147 Fed. 512; *Langdon v. Pennsylvania R. Co.* 194 Fed. 486. The object of the section was to provide against the abatement of the suit by death. *Re Connaway*, 178 U. S. 421, 44 L. ed. 1134, 20 Sup. Ct. Rep. 951.

Again, the joining of an administrator of a deceased joint defendant with the surviving defendant would be controlled by State statutes. *United States v. Bullard*, 103 Fed. 256.

Section 956 of U. S. Rev. Stat. only provides that in the event of the death of a joint plaintiff or defendant, when the cause of action survives the suit shall not abate, but shall proceed at the suit of the surviving plaintiff or against the surviving defendant. *Northwestern Consol. Mill. Co. v. Callam*, 177 Fed. 786-788 and cases cited. Sections 955 and 956 of U. S. Rev. Stat., referred to above, apply only to actions that survive, and as to what actions survive is regulated by State laws. *Martin v. Baltimore, & O. R. Co. (Gerling v. Baltimore & O. R. Co.)* 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Warren v. Furstenheim*, 1 L.R.A. 40, 35 Fed. 691-699. See *Schreiber v. Sharpless*, 110 U. S. 76, 28 L. ed. 65, 3 Sup. Ct. Rep. 423.

#### *Abatement of Suit for Nonjoinder of Parties.*

The Federal courts have adopted rules of their own governing the abatement of suits for the nonjoinder of parties; and in determining issues of this character it has become necessary to classify parties into proper, necessary, and indispensable parties. See *Simkins*, Federal Equity Suit, 2d ed. 229, where the classification is fully discussed.

By U. S. Rev. Stat. § 737, U. S. Comp. Stat. 1901, p. 587, it is provided that in any suit at law where there are several

defendants, and any one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction and proceed to the trial of the suit between the parties who are properly before the court, but the judgment or decree rendered therein shall not conclude or prejudice other parties not served with process, or who have not voluntarily appeared. And nonjoinder of parties who are not inhabitants of nor found within the district as aforesaid shall not constitute matter of abatement or objection to the suit. New Judicial Code, sec. 50. So the rule may be stated that when parties cannot be made because of absence from the jurisdiction, or the jurisdiction would be ousted as to parties properly before the court, the cause may proceed without bringing them in if they are not indispensable parties. Farmers' Bank v. Wright, 158 Fed. 841.

The above rule applies when the condition exists, otherwise abating a suit at law for the nonjoinder of parties, the Federal courts conform to the State practice and rules. Allnut v. Lancaster, 76 Fed. 132; Noyes v. Barnard, 11 C. C. A. 424, 15 U. S. App. 527, 63 Fed. 786, 787; Perry v. Mechanics Mut. Ins. Co. 11 Fed. 481.

#### *Abatement for Misjoinder of Parties Plaintiff or Defendant.*

The Federal courts follow the State practice. Buckingham v. Dake, 50 C. C. A. 492, 112 Fed. 259; Merchants' Ins. Co. v. Buckner, 49 C. C. A. 80, 110 Fed. 347.

#### *Death.*

Right of action for death must be strictly pursued as to parties authorized by State statutes to sue. Di Paolo v. Laquin Lumber Co. 178 Fed. 877, 878 and cases cited; Joplin & P. R. Co. v. Payne, 194 Fed. 387. When an action is brought for death occurring in another State you must establish the liability of the defendant in that State where the death occurred. St. Louis & S. F. R. Co. v. Loughmiller, 193 Fed. 689.

## CHAPTER V.

### PROCESS.

Form of process for the commencement of suits is controlled by the conformity act, sec. 914, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 684, except as to the official signature, seal and test, which by sec. 911, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 683, is required to all writs and processes issuing from the courts of the United States. *Gillum v. Stewart*, 112 Fed. 32; *Chamberlain v. Mensing*, 47 Fed. 436; *Shepard v. Adams*, 168 U. S. 624, 42 L. ed. 604, 18 Sup. Ct. Rep. 214. Congress having thus legislated as to the process, it must be followed (*Dwight v. Merritt*, 18 Blatchf. 305, 4 Fed. 614), though the State law permitted an attorney to issue the summons (*Middleton Paper Co. v. Rock River Paper Co.* 19 Fed. 252; *Aetna Ins. Co. v. Hallock* (*Aetna Ins. Co. v. Doe*) 6 Wall. 556, 18 L. ed. 948). There being no other direction as to the requirements of the writ or form of process, the body of the process may conform to the State law. Where a State law as to the form of the writ has been adopted by a rule of court, any subsequent change of the State law would not affect a writ issued under the old form as adopted. *Shepard v. Adams*, 168 U. S. 624, 42 L. ed. 604, 18 Sup. Ct. Rep. 214; *Ewing v. Burnham*, 74 Fed. 384; *Elson v. Waterford*, 135 Fed. 247; *Boston & M. R. Co. v. Gokey*, 210 U. S. 164, 52 L. ed. 1005, 28 Sup. Ct. Rep. 657, Id. 79 C. C. A. 64, 149 Fed. 42, 9 Ann. Cas. 384; *Kinney v. United States Fidelity & G. Co.* 182 Fed. 1005.

However, the Federal courts in some cases have refused to apply the requirements of section 911, when the summons or notice provided by the State law does not fall within the meaning of "process" as used in section 911, and will enforce the form of notice or summons required by the State law, as coming within the conformity act, sec. 914, U. S. Rev. Stat. *Leas v. Merriman*, 132 Fed. 510; followed in *Schofield v. Palmer*, 134 Fed. 754; *Chamberlain v. Mensing*, 47 Fed. 435.

See Wile v. Cohn, 63 Fed. 759. It is said in Michigan Trust Co. v. Ferry, 99 C. C. A. 221, 175 Fed. 679, that State laws and decisions cannot determine for the national courts what constitutes sufficient process, sufficient service of process, or sufficient appearance, when they are in issue. *Id.* 677, and cases cited.

Again, while State statutes may enlarge the power of amendment in Federal courts, they cannot limit the power conferred by Congress. Norton v. Dover, 14 Fed. 106; Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 987, 988 and cases cited; Kent v. Bay State Gas Co. 93 Fed. 887; Osborne v. Atschul, 35 C. C. A. 354, 93 Fed. 383; Lowry v. Story, 31 Fed. 769.

#### *Day of Teste of Process.*

By sec. 912, U. S. Rev. Stat. it is required that all process issued from the courts of the United States shall bear teste from the day of issue. U. S. Comp. Stat. 1901, p. 683.

#### *Amendment of Process.*

Any district court may amend at any time, in its discretion, and upon such terms as it may deem just, any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues. U. S. Rev. Stat. § 948, U. S. Comp. Stat. 1901, p. 695. By section 954 it is provided also that no summons, writ, process, return, or other proceeding in civil causes shall be quashed for any defect or want of form, etc., and either party may be permitted to amend in the discretion of the court and upon such terms as may be prescribed. U. S. Comp. Stat. 1901, p. 696. See Simkins, Federal Equity Suit, 2d ed. p. 315, for authorities. These statutes were intended to remove the technical and artificial rules that obstructed the administration of justice, and have been liberally construed and applied by the Federal courts in every step of procedure from the petition to the judgment. See McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 177, for a long line of decisions. Bowden v. Burnham, 8 C. C. A.

248, 19 U. S. App. 448, 59 Fed. 752; Bamberger v. Terry, 103 U. S. 43, 26 L. ed. 317; Shumacher v. St. Louis & S. F. R. Co. 39 Fed. 181; Baker v. Barber Asphalt Pav. Co. 92 Fed. 122. And it may be laid down as a rule that every error in process or pleading not affecting the substantial rights of the adverse party may be cured by amendment, and the rule is applied both in law and equity. Dancel v. United Shoe Machinery Co. 120 Fed. 839; Wm. Caraway & Sons v. Kentucky Ref. Co. 90 C. C. A. 59, 163 Fed. 189. In view of this broad discretion to permit amendments to process, we have had the rule applied to every feature of the process required to bring a party into court; for example: Altering the date when made returnable on the wrong day. Norton v. Dover, 14 Fed. 106; Gilbert v. South Carolina Interstate & W. I. Exposition Co. 113 Fed. 523; Semmes v. United States, 91 U. S. 21, 23 L. ed. 193. So where the summons required appearance in a different division of a district. Wm. Caraway & Sons v. Kentucky Ref. Co. 90 C. C. A. 59, 163 Fed. 189. So, correcting an erroneous statement in the summons. Chamberlain v. Bittersohn, 48 Fed. 43. So, issuing out of the district court and bearing teste of the chief justice. United States v. Turner, 50 Fed. 734. So, changing the name of the plaintiff to conform to the complaint. Gulf, C. & S. F. R. Co. v. James, 1 C. C. A. 53, 4 U. S. App. 19, 48 Fed. 148. So, increasing damages to retain jurisdiction. Davis v. Kansas City, S. & M. R. Co. 32 Fed. 863. So, absence of seal may be cured. Wolf v. Cook, 40 Fed. 434. So, when signed by the deputy clerk. Bragg v. Lorio, 1 Woods, 209, Fed. Cas. No. 1,800.

There must be something in the record to amend by. Chamberlain v. Bittersohn, 48 Fed. 43; Brown v. Pond, 5 Fed. 34; Dwight v. Merritt, 18 Blatchf. 305, 4 Fed. 616. When the summons is neither signed nor sealed, there is nothing to amend by. Ibid.

#### *Issuing and Service of Process.*

Under the judicial and removal act of 1888, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508, no suit can

be brought against any person by original process or proceeding in any other district than that of which he is an inhabitant; except when jurisdiction is founded on diversity of citizenship it may be brought in the district of the residence of either plaintiff or defendant. New Judicial Code, sec. 51.

When the State in which the suit is brought contains more than one district, then every suit not of a local nature against a single defendant must be brought in the district in which he resides; but if there are two or more defendants residing in different districts, it may be brought in either district, and duplicate writs may be issued and directed to the marshal of any district in which any of the defendants reside. New Judicial Code, sec. 52.

When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division in which the defendant resides; if there be two or more defendants residing in different divisions of the district, the suit may be brought in either division, and process issue to any other division in which any of the defendants reside. New Judicial Code, sec. 53.

In suits of a local nature the suit must be brought in the district and division of the district in which the property which is the subject-matter of the litigation is situated, and original or mesne process may issue to any district of the State in which the suit is brought and in which the defendant or defendants reside. New Judicial Code, sec. 54.

Where the land or other subject-matter in litigation lies in different districts, the suit may be brought in either district, and process issue to any district in the State where the defendants reside.

These statutes relating to the venue of suits, which were originally embodied in sections 740-742 of U. S. Rev. Stat., U. S. Comp. Stat. 1901, pp. 587, 588, are thus grouped to show where process may issue and the defendant or defendants be served, upon which the validity of the judgment will depend. The general rule is that the defendant must be served within the district to which the process issues, and unless so served, or the defendant voluntarily appears, no valid judgment can be

rendered. Michigan Trust Co. v. Ferry, 99 C. C. A. 235, 175 Fed. 672, and cases cited. The process has no extraterritorial effect unless there are two or more defendants living in different Federal districts of the State in which the suit is brought, in which case greater scope is given to the citation or summons, and it may be issued to and served in any district in the State in which any of the defendants reside. New Judicial Code, sec. 52; Re Dunn, 212 U. S. 388, 389, 53 L. ed. 564, 29 Sup. Ct. Rep. 299.

*By Whom Served.*

All process issuing from the Federal courts must be served by the marshal of the district to which the process is issued, and not by private persons, though authorized by the law of the State in which the suit is pending. U. S. Rev. Stat. Sects. 787, 788, U. S. Comp. Stat. 1901, p. 608; Shepard v. Adams, 168 U. S. 624, 42 L. ed. 604, 18 Sup. Ct. Rep. 214.

*Method of Service.*

While equity rule 13 provides the method of service in suits in equity, Congress has not designated how service shall be made in suits at law, and so the Federal courts in actions at law conform to the State practice as provided in U. S. Rev. Stat. sec. 914. Toledo Comput. S. Co. v. Computing Scale Co. 74 C. C. A. 89, 142 Fed. 919; King v. Davis, 137 Fed. 206, 207; Amy v. Watertown, 130 U. S. 302, 32 L. ed. 947, 9 Sup. Ct. Rep. 530. In Amy v. Watertown, 130 U. S. 304, 32 L. ed. 947, 9 Sup. Ct. Rep. 530, it is said that whatever belongs to practice and forms and modes of proceedings is controlled by the conformity act. And it has been frequently said that with regard to the mode and manner of service, Congress not having laid down any rule, the State law and practice must be followed. Swarts v. Christie Grain & Stock Co. 166 Fed. 338.

If there be no State statute, then Federal courts determine the method of service on principles of general jurisprudence. Kaufman v. Garner, 173 Fed. 550. See Collin County Bank v. Hughes, 81 C. C. A. 556, 152 Fed. 414.

*The Effect of Service.*

The effect of the service when regularly made brings the party into court for all purposes as fully as if he voluntarily appeared. *Goodman v. Ft. Collins*, 91 C. C. A. 98, 164 Fed. 970.

As to false return of service and remedy for, see *King v. Davis*, 137 Fed. 228, and cases cited.

*Service on Corporations.*

As to the method and sufficiency of service on corporation, see *Simkins, Federal Equity Suit*, 2d ed. pp. 317-324. It may be stated as a general rule that Federal courts follow the laws of the State. See *Higham v. Iowa State Traveler's Asso.* 183 Fed. 845; *Toledo Computing Scale Co. v. Computing Scale Co.* 74 C. C. A. 89, 142 Fed. 919.

*Sufficiency of Service.*

State laws cannot determine for the Federal courts the sufficiency of the service to give jurisdiction. *Michigan Trust Co. v. Ferry*, 99 C. C. A. 221, 175 Fed. 677, and numerous cases cited; *Clark v. Wells*, 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43, id. 136 Fed. 462; *Harland v. United Lines Teleg. Co.* 6 L.R.A. 252, 40 Fed. 308. See *Kaufman v. Garner*, 173 Fed. 550.

*Validity of; How Determined.*

By motion to quash. *Higham v. Iowa State Travelers' Asso.* 183 Fed. 847, and cases stated. *Wall v. Chesapeake & O. R. Co.* 37 C. C. A. 129, 95 Fed. 398-401.

As to form for motion, see *Wells v. Clark*, 136 Fed. 463. As to distinction between "void" and irregular process, see *Jochem v. Cooley*, 100 C. C. A. 155, 176 Fed. 719; *Bryan v. Congdon*, 29 C. C. A. 670, 57 U. S. App. 505, 86 Fed. 221.

*Substituted Service.*

The laws of the States providing for substituted service of parties beyond the territorial limits of the process of the courts are not followed by the Federal courts. *Bracken v. Union P. R. Co.* 5 C. C. A. 548, 12 U. S. App. 421, 56 Fed. 447. Congress has legislated upon the subject, and provided for substituted service in certain character of cases. By section 8 of the act of 1875, made a part of the act of 1888, and embodied in the New Judicial Code, sec. 57, it is provided, among other things, that when in any suit brought in the district courts of the United States to enforce any claim to real or personal property, within the district in which the suit is brought, one or more of the defendants shall not be an inhabitant or found within the district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a designated day, which order shall be served on the defendant, if practicable, wherever found, and also upon the person or persons in charge of the property if any there be, or if such personal service cannot be made, then it provides for publication of the order, etc. As to the forms to be used in procuring the order, and the method used in serving it, see Simkins, *Federal Suit*, 2d ed. pp. 334-342. The mode provided must be strictly followed. *Jennings v. Johnson*, 78 C. C. A. 329, 148 Fed. 337; *King v. Davis*, 137 Fed. 207. The suit must be one *in rem* for section 8 to apply. *Jones v. Gould*, 141 Fed. 698, *Id.* 80 C. C. A. 1, 149 Fed. 153.

*Effect of Special Appearance.*

The effect of State laws which give to a special appearance entered to challenge the court's jurisdiction the force and effect of a general appearance is not followed in the Federal courts. *Southern P. Co. v. Denton*, 146 U. S. 208, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; *O'Connell v. Reed*, 5 C. C. A. 586, 12 U. S. App. 369, 56 Fed. 538; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 205, 37 L. ed. 699, 703, 13 Sup. Ct. Rep. 859; *Jones v. Gould*, 80 C. C. A. 1, 149 Fed. 153. The Federal courts are

liberal in permitting a special appearance to attack irregularities of service or want of jurisdiction. See Simkins, Federal Equity Suit, 2d ed. pp. 329-338.

*When is the Suit Said to be Begun.*

When by the law of the State in which the court is sitting the filing of the petition in the court of proper jurisdiction is the beginning of the suit, the Federal court will conform to the rule. International Bank & Trust Co. v. Scott, 86 C. C. A. 248, 159 Fed. 60; Re Connaway, 178 U. S. 430, 431, 44 L. ed. 1137, 1138, 20 Sup. Ct. Rep. 951; Goldenberg v. Murphy, 108 U. S. 162, 27 L. ed. 686, 2 Sup. Ct. Rep. 388; Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co. 152 Fed. 824. But it seems the filing of the petition would not stop the running of the statute of limitations until process had been sued out and served or a bona fide effort made to serve the defendant. United States v. American Lumber Co. 80 Fed. 315, 316; Michigan Ins. Bank v. Eldred, 130 U. S. 697, 32 L. ed. 1082, 9 Sup. Ct. Rep. 690.

*Suit in Forma Pauperis.*

By act of July, 1892, 27 Stat. at L. 252, chap. 209, U. S. Comp. Stat. 1901, p. 706, any citizen of the United States entitled to sue in the Federal courts may do so, without being required to prepay costs or give security therefor, by filing under oath a statement in writing that because of his poverty he is unable to do so; setting forth briefly the nature of the cause of action. Boyle v. Great Northern R. Co. 63 Fed. 539; Volk v. B. F. Sturtevant Co. 39 C. C. A. 646, 99 Fed. 532; McDuffee v. Boston & M. R. Co. 82 Fed. 865; Woods v. Bailey, 111 Fed. 121. As to filing after suit brought, see Donovan v. Salem & P. Nav. Co. 134 Fed. 317. But the act does not apply to appellate proceedings. Taylor v. Adams Exp. Co. 90 C. C. A. 526, 164 Fed. 616. The process must be served. Act of 1892, cl. 3. Columb v. Webster Mfg. Co. 76 Fed. 198; Gallaway v. Ft. Worth Bank (Galloway v. State Nat. Bank) 186 U. S. 177, 46 L. ed. 1111, 22 Sup. Ct. Rep. 811.

*Sufficiency and Scope of Pleading.*

The sufficiency and scope of pleadings are determined by State laws and decisions. *Glenn v. Sumner*, 132 U. S. 156, 33 L. ed. 301, 10 Sup. Ct. Rep. 41; *Bond v. Dustin*, 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 296; *Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 372; *Robertson v. Perkins*, 129 U. S. 234, 235, 32 L. ed. 687, 9 Sup. Ct. Rep. 279; *Norfolk & P. Traction Co. v. Rephan*, 110 C. C. A. 254, 188 Fed. 276; *Gadonnex v. New Orleans R. Co.* 128 Fed. 806, 807; *Alexander v. Gordon*, 41 C. C. A. 228, 101 Fed. 94; *Van Doren v. Pennsylvania R. Co.* 35 C. C. A. 282, 93 Fed. 262. You may look to State statutes and decisions to determine construction of pleadings. *Bryson v. Gallo*, 103 C. C. A. 424, 180 Fed. 71-74 and cases cited; *Swift & Co. v. Jones*, 76 C. C. A. 253, 145 Fed. 491; *Hein v. Westinghouse Air Brake Co.* 168 Fed. 766, 769; *Burlington Ins. Co. v. Miller*, 8 C. C. A. 612, 19 U. S. App. 588, 60 Fed. 256; *Barnes v. Union P. R. Co.* 4 C. C. A. 199, 12 U. S. App. 1, 54 Fed. 87.

## CHAPTER VI.

### DEFENSIVE PLEADINGS.

Having seen the limited nature of Federal jurisdiction, and that jurisdiction must appear by direct allegations in the petition or declaration, then, if it should not so appear you may demur, or you may raise the issue by motion to dismiss. *Hagstoz v. Mutual L. Ins. Co.* 179 Fed. 569. Being fundamental, there is no exclusive method of calling the court's attention to it. *Adams v. Shirk*, 55 C. C. A. 25, 117 Fed. 801; *Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co.* 181 Fed. 974; *Steigleder v. McQuesten*, 198 U. S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616; *Ladew v. Tennessee Copper Co.* 179 Fed. 245.

The rule may be stated that want of jurisdiction may be pleaded on the law side in any manner available in the State courts since the conformity act in 1872; and if by the State Code the general denial puts in issue all the allegations of the petition, it will put in issue all jurisdictional allegations, and proof may be offered. *Yocum v. Parker*, 66 C. C. A. 80, 130 Fed. 772; *Roberts v. Lewis*, 144 U. S. 656, 36 L. ed. 582, 12 Sup. Ct. Rep. 781; *Roberts v. Langenbach*, 56 C. C. A. 253, 119 Fed. 349; *Greene v. Tacoma*, 53 Fed. 563; *Jones v. Rowley*, 73 Fed. 288. If required to be set up by answer in State Code, the plea in abatement will be considered as an answer. *Whelan v. Rio Grande Western R. Co.* 111 Fed. 328. If, however, the issue is met by demurrer or special plea or answer, then you may use the following forms, as these defenses are permitted before pleading to the merits if desired. *Jones v. Rowley*, 73 Fed. 287.

A. B.                      In District Court of the United States for the....  
vs.                      } at Law.                      District of .....  
C. D.                      }                      Sitting at .....

The Demurrer of C. D. (or Joint Demurrer of C. D. and E. F.)

And now comes the defendant or defendants, and demur to the petition filed herein, and for cause of demurrer shows that it appears from said

petition that the jurisdiction of this court depends on diversity of citizenship, and that said diversity is not shown for that plaintiff and defendant or one of the defendants (naming him) are, as appears, citizens of the same State, and not different States (or that it appears both plaintiff and defendant are aliens; or that there are aliens on both sides of the controversy with citizens of States; or that neither plaintiff nor defendant are citizens of the State in which the suit is brought; or citizens of the same State are suing in a third State; or that two or more citizens of different States are suing a defendant from a third State, or any other objection which may be raised under the rules of jurisdiction in the Federal courts; only be specific as to the ground of objection, wherefore defendant pray the judgment of the court that he be dismissed with his costs in this behalf incurred

~ (Signed by) .....,  
Attorney for defendant.

Whether the issue is raised by demurrer or motion, the above form may be used.

Where the petition sufficiently alleges citizenship, but it is not true as alleged, the issue may be raised by a special plea or in the answer, and the following form may be used.

(Title and heading as above if by special plea.)

That it appears that the jurisdiction of this court depends on diversity of citizenship of the parties to this suit, and that so much of the allegations of said petition as avers said diversity of citizenship is not true, for defendant avers that the plaintiff A. B. is not a citizen or resident of the State of ....., as alleged by him, but was at the commencement of this suit (and is now) a citizen and resident of the State of ..... of which State the defendant or one of the defendants (naming him) was at the commencement of this suit a citizen and resident (or that plaintiff and defendant are citizens of different States from that in which the suit is brought; or any other ground of objection as would defeat jurisdiction under the rules given governing the jurisdiction of the Federal courts. All of which matters and things this defendant, or these defendants, aver to be true and plead the same in bar of plaintiff's suit, and pray the court to dismiss the cause, and that he have judgment for his reasonable costs in this behalf incurred.

The same form may be used if set up in answer. Where a corporation is defendant, the forms set forth in Simkins, Federal Equity Suit, 2d ed. pp. 124, 125, may be used. However, where a State Code gives to a general denial the effect of putting in issue every allegation of the petition, the existence of

diverse citizenship would be put in issue. Roberts v. Lewis, 144 U. S. 653-658. Where the issue is as to the district of suit or venue, use forms given in Simkins, Federal Equity Suit, 2d ed. pp. 130, 131. Where the want of necessary citizenship appears on the trial, use the form of motion to dismiss given in Simkins, Federal Equity Suit, 2d ed. p. 128.

*Raising Issue as to the Existence of a Federal Question.*

When a Federal question is the basis of jurisdiction the question of citizenship is not material, as citizens of the same State may sue each other in the Federal courts if jurisdiction rests upon the existence of a Federal question. The suit, however, can only be brought in the State and district of which the defendant is an inhabitant. The want of a Federal question in the statement of plaintiff's case, if jurisdiction depends on it, may be raised by demurrer if the want of it appears, or by plea or answer if it is untruly and fraudulently alleged. As to how and where the Federal question is to appear has been thoroughly discussed in Simkins, Federal Equity Suit, 2d ed. pp. 152-158. As to how the issue is raised, see Simkins, Federal Equity Suit, 2d ed. p. 167; and form given on p. 168, id. may be used and adapted to the suit at law.

*Raising the Issue as to Sufficiency of Amount to Give Jurisdiction.*

The issue may be raised by demurrer if apparent, or by plea or answer or affidavit, or by motion or suggestion, or the court may of his own accord act if it appears in the evidence pertinent to the issue. Simkins, Federal Equity Suit, 2d ed. p. 199. The forms for raising the issue, whether by demurrer, plea, answer, etc., are given in Simkins, Federal Equity Suit, 2d ed. pp. 201, 202, *mutatis mutandis*, as to the suit at law. Whether the suit involves the jurisdictional amount is not controlled by State statutes. Heffner v. Gynne-Treadwell Cotton Co. 87 C. C. A. 606, 160 Fed. 635.

S. S. at L.—3.

*Pleas in Abatement.*

Must be filed in the order as required by State Codes. *Tennis Bros. Co. v. Wetzel & T. R. Co.* 140 Fed. 193, *id.* 75 C. C. A. 266, 145 Fed. 458, 7 Ann. Cas. 426; *Derk P. Yonkerman Co. v. Charles H. Fuller's Advertising Agency*, 135 Fed. 613. Matters *dehors* the record must be presented by plea. *Schofield v. Palmer*, 134 Fed. 753. And the plea must give the opponent a better writ. *Computing Scale Co. v. Moore*, 139 Fed. 197. The rulings on pleas in abatement are not reviewable. *Barnsdale v. Waltemeyer*, 73 C. C. A. 515, 142 Fed. 415. See *Simkins, Federal Equity Suit*, 2d ed. pp. 409, 411.

*The Demurrer.*

The scope and sufficiency of pleading is usually tested by demurrer, or, if the State practice provides any other method, it may be followed. *Rush Canal v. Newman*, 7 C. C. A. 136, 12 U. S. App. 635, 58 Fed. 159; *Chemung Bank v. Lowry*, 93 U. S. 76, 23 L. ed. 806; *Kester v. Western U. Teleg. Co.* 108 Fed. 926. The demurrer admits all the facts in the pleading well pleaded, and only raises the issue of their legal sufficiency to support the cause of action (*Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404; *Calhoun v. Pullman Co.* 16 L.R.A.(N.S.) 575, 86 C. C. A. 387, 159 Fed. 387. See *Simkins, Federal Equity Suit*, 2d ed. p. 398, *Effect of demurrer*); but not conclusions of law (*General Electric Co. v. Westinghouse Electric & Mfg. Co.* 144 Fed. 458). However, in determining the sufficiency by demurrer of the pleading, the allegations are taken most strongly against the pleader (*Chambers v. First Nat. Bank*, 144 Fed. 717); unless a State statute provides otherwise (*Sommer v. Carbon Hill Coal Co.* 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 60; *United States v. Parker*, 120 U. S. 94, 30 L. ed. 604, 7 Sup. Ct. Rep. 454. See *Kent v. Bay State Co.* 93 Fed. 887); for in determining the demurrer State decisions are controlling. *Norfolk & P. Traction Co. v. Rephan*, 110 C. C. A. 254, 188 Fed. 276-279. The Federal courts will permit a defendant to withdraw a plea to file a demurrer,—at least it is discretionary. *Loeb v. Eastman Kodak Co.* 106 C. C. 142, 183 Fed. 705; *Bal-*

timore & O. R. Co. v. Camp, 26 C. C. A. 626, 54 U. S. App. 110, 81 Fed. 807.

*Form of.*

Follows State requirements. Brown v. Cumberland Teleph. & Teleg. Co. 181 Fed. 247.

*Trying Pleading on Demurrer.*

Where a demurrer is sustained, the right to amend follows, and the filing of an amendment would not constitute a waiver of the demurrer if the ruling is duly excepted to, even though a State rule gives it that effect. Worthington v. Beeman, 33 C. C. A. 475, 63 U. S. App. 536, 91 Fed. 232; Williamson v. Liverpool & L. & G. Ins. Co. 72 C. C. A. 542, 141 Fed. 57, 5 Ann. Cas. 402. However, the right to amend is discretionary, and not reviewable unless abused. McKeney v. Supreme Lodge, A. O. U. W. 104 C. C. 117, 180 Fed. 967, and cases cited. Where the demurrer going to the incompleteness or uncertainty of averment is overruled, then an answer to the merits waives any error in overruling the demurrer; but where the demurrer goes to the absence of any cause of action in the petition upon which plaintiff could recover, and it is overruled and defendant answers to the merits, the defendant loses no right to have the judgment on the verdict reviewed. Teal v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420. See German Alliance Ins. Co. v. Hale, 219 U. S. 319, 320, 55 L. ed. 236, 237, 31 Sup. Ct. Rep. 246. This is the practice of the Federal courts without reference to the State rule. Williamson v. Liverpool & L. & G. Ins. Co. 72 C. C. A. 542, 141 Fed. 58, 5 Ann. Cas. 402 and cases cited. The general demurrer should be overruled if there are sufficient facts stated to sustain a verdict for plaintiff. Gonsouland v. Rosomano, 100 C. C. A. 97, 176 Fed. 481; Latham v. Staten Island R. Co. 150 Fed. 235; Moore v. East Tennessee Teleph. Co. 74 C. C. A. 227, 142 Fed. 965. The objection to a plea for duplicity should be made by motion to strike out, and not by demurrer. Smythe v. New Providence, 158 Fed. 215; J. W. Bishop Co. v. Shelhore, 72 C. C. A. 337, 141 Fed. 643.

*Answer.*

Since the conformity act in 1872 required the Federal courts to conform to the order of pleading and practice prevailing in the State courts, all defenses in the form of pleas, answers, or demurrers open to the defendant in the State courts are open to him in the Federal courts. *Roberts v. Lewis*, 144 U. S. 656, 657, 36 L. ed. 582, 12 Sup. Ct. Rep. 781; *Southern P. Co. v. Denton*, 146 U. S. 209, 36 L. ed. 946, 13 Sup. Ct. Rep. 44. And whether the defenses shall be pleaded successively or together is governed by the State Codes or rules. *Ibid*; *Draper v. Springport*, 21 Blatchf. 240, 15 Fed. 328. So that if by the State Code pleas in abatement, to the jurisdiction and on the merits can be pleaded together in the same answer, they can be so set up in the Federal courts. *Ibid*. But while permitted by State rules to plead abatement, jurisdiction and the merits, at the same time, the defendant need not do so, but may present in the Federal court his pleas to the jurisdiction or in abatement of the suit before pleading to the merits. *Jones v. Rowley*, 73 Fed. 287.

Where a defense of any character is required to be pleaded specially by the State Code, or rule, it will be required in the Federal courts. *Hardy v. Chicago*, St. P. M. & O. R. Co. 172 Fed. 454; *Preferred Acci. Ins. Co. v. Barker*, 35 C. C. A. 250, 93 Fed. 158. See *English v. Ralston*, 112 Fed. 274; *Southern R. Co. v. King*, 87 C. C. A. 284, 160 Fed. 332. This rule was applied in *Hardy v. Chicago*, St. P. M. & O. R. Co. 172 Fed. 454, and cases cited, and in *Canadian P. R. Co. v. Clark*, 20 C. C. A. 447, 38 U. S. App. 573, 73 Fed. 76. See also *Gadonneix v. New Orleans R. Co.* 128 Fed. 805; *McInerney v. Virginia-Carolina Chemical Co.* 118 Fed. 653; *Groton Bridge & Mfg. Co. v. American Bridge Co.* 151 Fed. 879. So the right to plead set-off or counterclaim, when not equitable in character, will be controlled by State statutes. See *Gorton Bridge & Mfg. Co. v. American Bridge Co.* 151 Fed. 879; *Dushane v. Benedict*, 130 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; *Charnley v. Sibley*, 20 C. C. A. 157, 34 U. S. App. 705, 73 Fed. 980; *Arkwright Mills v. Aultman & T. Machinery Co.* 128 Fed. 196; *MERCHANTS' HEAT & LIGHT CO. v. J. B. Clow & Sons*, 204 U. S.

290, 51 L. ed. 490, 27 Sup. Ct. Rep. 285; California Canneries Co. v. Pacific Sheet Metal Works, 91 C. C. A. 106, 164 Fed. 979; Anglo-American Land, Mortg. & Agency Co. v. Lombard, 68 C. C. A. 89, 132 Fed. 731, 732; Wheeling Bridge & Terminal Co. v. Cochran, 15 C. C. A. 321, 25 U. S. App. 306, 68 Fed. 141; McGuire v. Gerstley, 204 U. S. 489-503, 51 L. ed. 589, 27 Sup. Ct. Rep. 332; Fish v. First Nat. Bank, 84 C. C. A. 502, 47 Fed. 87.

When under the State Code the answer puts in issue every material allegation of the petition, the plaintiff must prove all such allegations (Hodges v. Easton, 106 U. S. 410, 27 L. ed. 170, 1 Sup. Ct. Rep. 307); and the effect given to the general issue by the State Code will be followed by the Federal courts (*Ibid.*; Burley v. German-American Bank, 111 U. S. 221, 28 L. ed. 407, 4 Sup. Ct. Rep. 341; Roberts v. Lewis, 144 U. S. 656, 36 L. ed. 582, 12 Sup. Ct. Rep. 781; Handly Varnish Co. v. Midland Linseed Oil Co. 191 Fed. 256; Yocum v. Parker, 66 C. C. A. 80, 130 Fed. 772; Peper Automobile Co. v. American Motor Car Sales Co. 180 Fed. 245; McGrath v. Valentine, 93 C. C. A. 109, 167 Fed. 473; Cole v. Carson, 82 C. C. A. 408, 153 Fed. 278. See Alaska Commercial Co. v. Williams, 63 C. C. A. 92, 128 Fed. 365).

#### *Confession and Avoidance.*

When such affirmative defense is set up, complete in itself, and good in law, it defeats the action. Stratton's Independence v. Dines, 126 Fed. 968, *id.* 68 C. C. A. 161, 135 Fed. 449.

#### *Admissions in Answer.*

'Admissions, in the answer, of plaintiff's allegations, or any of them, waive proof. So, the failure to answer any of the material allegations in plaintiff's petition admits the truth.

#### *Bill of Particulars.*

'A bill of particulars may be demanded to secure certainty in the petition or complaint. (Zulkowski v. American Mfg. Co.

163 Fed. 550; DeGalindez v. Ennis, 149 Fed. 911; Singers-Bigger v. Young, 91 C. C. A. 510, 166 Fed. 82; McFarland v. Consolidated Gas Co. 125 Fed. 260); which may be amended (Lamar v. Spalding, 83 C. C. A. 111, 154 Fed. 27. See Stilkragon v. Baltimore & O. R. Co. 86 C. C. A. 287, 159 Fed. 97, where the amendment was held to be in discretion of court).

*Verification of Pleadings.*

The verification of pleadings is governed by State laws. St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 96, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1132; Cottier v. Stimson, 9 Sawy. 435, 18 Fed. 689.

*Replication.*

Whatever pleading by the State Code puts in issue the answer, or if none is required, the rule will be followed by the Federal courts. See Stratton v. Essex County Park Commission, 164 Fed. 901, id. 145 Fed. 436; Stratton's Independence v. Dines, 68 C. C. A. 161, 135 Fed. 449; Walton v. Wild Goose Min. & Trading Co. 60 C. C. A. 155, 123 Fed. 209, 22 Mor. Min. Rep. 688.

In Texas the supplemental petition puts in issue the answer, or states facts of confession and avoidance. See Bush v. Pioneer Min. Co. 102 C. C. A. 372, 179 Fed. 78.

## CHAPTER VII.

### WHAT EQUITABLE PLEAS ARE NOT ADMISSIBLE ON THE LAW SIDE—IN THE FEDERAL COURTS.

The jurisprudence of the United States has always recognized the distinction between law and equity to be, under the Constitution, both matter of substance as well as of form and procedure, and section 914 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 684, in providing that the practice, pleading and forms, and mode of procedure in the Federal courts shall conform as near as may be to the practice, forms, and procedure in the State courts of the State where sitting, specially excludes equity suits and causes therefrom.

Consequently “the remedies in the United States courts are at common law or in equity not according to the practice in the States, but according to the principles of common law and equity as defined in that country from which we derive our knowledge of the principles, and though the forms and proceedings and practice in the State courts shall have been adopted in the circuit courts of the United States, yet the adoption of the State practice on the law side must not be understood as confounding the principles of law and equity, nor the blending of legal and equitable claims in one suit.” United Cigarette Mach. Co. v. Wright, 132 Fed. 195.

In a word, as said in Lindsay v. First Nat. Bank, 156 U. S. 485, 39 L. ed. 505, 15 Sup. Ct. Rep. 472, citing many of the older cases: You cannot substitute the machinery of the law, in which facts are found by a jury and the law prescribed by the court, for the usual and legitimate practice of a court of chancery. The equity side of the Federal court is the only proper forum where the equities of litigating parties can be considered. Foster v. Mora, 98 U. S. 425, 25 L. ed. 191; Johnson v. Christian, 128 U. S. 382, 32 L. ed. 414, 9 Sup. Ct. Rep. 87; Hill v. Northern P. R. Co. 51 C. C. A. 544, 113 Fed. 917. See also Schurmeier v. Connecticut Mut. L. Ins. Co. 96 C. C. A. 107, 171 Fed. 16, and authorities cited. Levi v. Mathews, 76 C. C.

A. 122, 145 Fed. 154; Armstrong Cork Co. v. Merchants' Refrigerating Co. 107 C. C. A. 93, 184 Fed. 204.

And the rule that equitable defenses cannot prevail against the legal title in the Federal courts is not affected by the statutes of the State or its procedure. Seefeld v. Duffer, 103 C. C. A. 32, 179 Fed. 218.

In Bennett v. Butterworth, 11 How. 669, 13 L. ed. 859, it is said: "In creating and defining the judicial power of the general government the Constitution establishes the distinction between law and equity." Thompson v. Central Ohio R. Co. 6 Wall, 134-139, 18 L. ed. 765-767. And under the jurisprudence of the United States a court of law can no more take cognizance of an equitable defense than a court of equity can entertain a suit upon a purely legal title. Thompson v. Central Ohio R. Co. 6 Wall. 134, 18 L. ed. 765; Schoolfield v. Rhodes, 27 C. C. A. 95, 49 U. S. App. 486, 82 Fed. 155; McConihay v. Wright, 121 U. S. 201, 30 L. ed. 932, 7 Sup. Ct. Rep. 940; Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 211, 21 L. ed. 43; Northern P. R. Co. v. Paine, 119 U. S. 562, 565, 30 L. ed. 513, 514, 7 Sup. Ct. Rep. 323; Johnston v. Corson Gold Min. Co. 15 L.R.A.(N.S.) 1078, 84 C. C. A. 593, 157 Fed. 145; Davis v. Waklee, 156 U. S. 686, 39 L. ed. 583, 15 Sup. Ct. Rep. 555; Wehrman v. Conklin, 155 U. S. 315, 39 L. ed. 167, 15 Sup. Ct. Rep. 129; Gibson v. Chouteau, 13 Wall. 102, 20 L. ed. 537; Stone v. Perkins, 85 Fed. 620; Scott v. Neely, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; Levi v. Mathews, 76 C. C. A. 122, 145 Fed. 154; Snyder v. Pharo, 25 Fed. 400; Schurmeier v. Connecticut Mut. L. Ins. Co. 69 C. C. A. 22, 137 Fed. 42. And this distinction cannot be waived. Levi v. Mathews, 76 C. C. A. 122, 145 Fed. 154, and authorities. Court must act *sua sponte*. Terry v. Davy, 46 C. C. A. 141, 107 Fed. 50; Mulqueen v. Schlichter Jute Cordage Co. 108 Fed. 932. So, equitable defenses are not permitted in actions at law. Platt v. Larter, 94 Fed. 612; Parsons v. Denis, 2 McCrary, 359, 7 Fed. 317; Wagner v. National L. Ins. Co. 33 C. C. A. 121, 61 U. S. App. 691, 90 Fed. 399; Levi v. Mathews, 76 C. C. A. 122, 145 Fed. 154; Burnes v. Scott, 117 U. S. 582, 29 L. ed. 991, 6 Sup. Ct. Rep. 865; Beatty v. Wilson, 161 Fed. 458; Fenn v. Holme, 21 How. 482, 16 L. ed. 198; Sheirburn v.

Cordova, 24 How. 425, 16 L. ed. 741; Foster v. Mora, 98 U. S. 425, 25 L. ed. 191; McManus v. Chollar, 63 C. C. A. 454, 128 Fed. 903.

The defendant is often compelled to enjoin the suit at law in order to avail himself of the equitable defense he may have in the case, and this is peculiarly the case in the action of ejectment or trespass to try title, where the defendant is compelled to become a complainant in a court of equity to establish his equitable title or interest to which he is entitled as against the legal title. This necessity results from a want of power in the lower courts to determine equitable defenses. (See Enjoining Suits at Law.)

The cases are early and late where, in actions of ejectment on the law side of the Federal courts, the defendant has been sent to the equity side to set up equities which would show the right in the defendant, or establish such equitable defenses as may defeat the plaintiff in ejectment. Lerma v. Stevenson, 40 Fed. 359; Foster v. Mora, 98 U. S. 428, 25 L. ed. 192; Davis v. Davis, 18 C. C. A. 438, 30 U. S. App. 723, 72 Fed. 83; Singleton v. Touchard, 1 Black, 344, 17 L. ed. 50; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 452, 27 L. ed. 228, 1 Sup. Ct. Rep. 389; Greer v. Mezes, 24 How. 274, 16 L. ed. 663; Tegarden v. Le Marchel, 129 Fed. 488; Johnston v. Corson Gold Min. Co. 15 L.R.A.(N.S.) 1078, 84 C. C. A. 593, 157 Fed. 149; Schoolfield v. Rhodes, 27 C. C. A. 95, 49 U. S. App. 486, 82 Fed. 155; Johnson v. Christian, 128 U. S. 382, 32 L. ed. 414, 9 Sup. Ct. Rep. 87; Langdon v. Sherwood, 124 U. S. 84, 31 L. ed. 346, 8 Sup. Ct. Rep. 429; Mulqueen v. Schlichter-Jute Cordage Co. 108 Fed. 931; McManus v. Chollar, 63 C. C. A. 454, 128 Fed. 905.

Where "want of consideration" amounts to an equitable defense, it cannot be pleaded at law. Burnes v. Scott, 117 U. S. 582, 29 L. ed. 991, 6 Sup. Ct. Rep. 865.

Partnership settlement as a defense to a note is equitable, and cannot be pleaded at law. Burnes v. Scott, 117 U. S. 587, 29 L. ed. 992, 6 Sup. Ct. Rep. 865; Johnson v. Christian, 128 U. S. 382, 32 L. ed. 414, 9 Sup. Ct. Rep. 87.

The right to possession is as complete a defense as the legal title, on the law side. Schoolfield v. Rhodes, 27 C. C. A. 95, 49 U. S. App. 486, 82 Fed. 155.

*Laches.*

Laches cannot be pleaded at law where the period of time is less than that necessary to raise the bar of limitation, it being under such circumstances purely equitable. *Korsstrom v. Barnes*, 156 Fed. 284; *United States Fidelity & G. Co. v. United States*, 189 Fed. 339.

*Improvements in Good Faith.*

In Texas, in a plain action to try title, where the only issue is "not guilty," equitable relief cannot be obtained by either party, although it arises in the evidence (*Roth v. Schroeter*, — Tex. Civ. App. —, 129 S. W. 205; *Smith v. Olivarri*, — Tex. Civ. App. —, 127 S. W. 235; *Matthews v. Moses*, 21 Tex. Civ. App. 494, 52 S. W. 113; *Fleming v. Ball*, 25 Tex. Civ. App. 209, 60 S. W. 985; *Isbell v. Southworth*, 52 Tex. Civ. App. 399, 114 S. W. 689; *Sanborn v. Bush*, 41 Tex. Civ. App. 24, 91 S. W. 883; *Groesbeck v. Crow*, 85 Tex. 200, 20 S. W. 49); unless the right of recovery is based on an equitable title (*McManus v. Chollar*, 63 C. C. A. 454, 128 Fed. 903).

The plea of improvements in good faith is distinctly equitable in character, though permitted by statute to be set up in an action to try title. Being an equitable defense, it should not be allowed in the action to try title on the law side in those courts where a divided system is recognized.

In *Doe ex dem. Myrick v. Roe*, 31 Fed. 98, 99, it is said that, though found in the State Code, it is no new principle, as it was known and recognized in England prior to 1776, and was treated by the English courts purely as an equitable defense.

Where, however, the suit is to recover rents as well as the land, then one may at law recoup the value of improvements. *Green v. Biddle*, 8 Wheat. 81, 82, 5 L. ed. 567.

In *Griswold v. Bragg*, 48 Fed. 519, after judgment at law for the land the court allowed defendants to file a bill in equity setting up improvements in good faith.

In *Leighton v. Young*, 18 L. R. A. 266, 3 C. C. A. 176, 10 U. S. App. 298, 52 Fed. 439, it was held that "improvements in good faith" was an equitable plea, and in enforcing the right

State procedure did not govern the Federal courts, but the remedy would be enforced through the modes of procedure prescribed by chancery courts. *New Orleans v. Gaines*, 15 Wall. 624-635, 21 L. ed. 215-220; *Searl v. School Dist. No. 2*, 133 U. S. 553, 33 L. ed. 740, 10 Sup. Ct. Rep. 374; *McClaskey v. Barr*, 62 Fed. 209; *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513, 10 Sup. Ct. Rep. 216.

In *Tegarden v. Le Marchel*, 129 Fed. 489, 490, the plea was set up at law, but not allowed, because the improvements were made on government lands, and no issue as to the nature of the plea was made.

In *Cox v. Hart*, 145 U. S. 376, 36 L. ed. 741, 12 Sup. Ct. Rep. 962, a suit in trespass to try title was brought in Texas, and the jury brought in a verdict framed in accordance with the Texas statute providing what must be found by them when improvements in good faith were pleaded. The district court entered judgment in accordance with the verdict, and the judgment was sustained, but no issue as to the nature of the plea was raised.

See also *Cooke v. Avery*, 147 U. S. 392, 37 L. ed. 215, 13 Sup. Ct. Rep. 340. See Act June 1, 1874, 18 Stat. at L. 50, chap. 200, U. S. Comp. Stat. 1901, pp. 581, 582, providing that an occupant of land in good faith making valuable improvements thereon shall be entitled in Federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the State where the land lies, though the title was granted by the United States after the improvements were made.

### *Equitable Title.*

In ejectment an equitable title cannot be set up on the law side, either as a cause of action or as a defense. *Foster v. Mora*, 98 U. S. 428, 25 L. ed. 192; *Highland Boy Gold Min. Co. v. Strickle*, 54 C. C. A. 186, 116 Fed. 852; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; *Davis v. Davis*, 18 C. C. A. 438, 30 U. S. App. 723, 72 Fed. 83; *Daniel v. Felt*, 100 Fed. 728; *Johnson v. Christian*, 128 U. S. 382, 32 L. ed. 414, 9 Sup. Ct. Rep. 87; *Schoolfield v. Rhodes*,

27 C. C. A. 95, 49 U. S. App. 486, 82 Fed. 155; Kilgore v. Norman, 119 Fed. 1007; Tegarden v. Le Marchel, 129 Fed. 487.

The strict legal title only can prevail at law. *Ibid.*; Carter v. Ruddy, 166 U. S. 496, 41 L. ed. 1091, 17 Sup. Ct. Rep. 640; Mulqueen v. Schlichter Jute Cordage Co. 108 Fed. 931; Lerma v. Stevenson, 40 Fed. 359.

Or it may be maintained on prior possession as against a trespasser. *Wilson v. Fine*, 38 Fed. 792.

Thus, a defendant cannot set up an equitable title to defeat the legal title by impeaching a patent, though a statute permits it to be done in the State courts. *Tegarden v. Le Marchel*, 129 Fed. 487; *Northern P. R. Co. v. Paine*, 119 U. S. 561, 30 L. ed. 513, 7 Sup. Ct. Rep. 323; *McManus v. Chollar*, 63 C. C. A. 454, 128 Fed. 902; *Mulqueen v. Schlichter Jute Cordage Co.* 108 Fed. 931. See also *Jones v. Mutual Fidelity Co.* 123 Fed. 506; *Oaksmithe v. Johnston*, 92 U. S. 343, 23 L. ed. 682; *Sheirburn v. Cordova*, 24 How. 425, 16 L. ed. 741; *Saunders v. Wilson*, 19 Tex. 196.

#### *Fraud—When Cannot be Set Up at Law.*

While the law has concurrent jurisdiction in fraud, yet the Federal courts have classified fraud with reference to jurisdiction, and have designated the character of fraud that is cognizable in courts of equity only.

The classification as made may be designated as follows: Misrepresentation of value, quantity, quality, etc., or fraud entering into the execution of an instrument, are cognizable on the law side; but fraud consisting in overreaching or improper influences is cognizable in equity. *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594; *Boggs v. Wann*, 58 Fed. 686; *Stephenson v. Supreme Council*, A. L. H. 130 Fed. 491; *Levi v. Mathews*, 76 C. C. A. 122, 145 Fed. 154; *Heck v. Missouri P. R. Co.* 147 Fed. 781.

Where a judgment is sued on, an answer impeaching it for fraud is an equitable defense, and not available in an action at law. *Buller v. Sidell*, 43 Fed. 116. See *Boggs v. Wann*, 58 Fed. 685.

So, inadequacy of consideration, when accompanied by fraud, is an equitable plea, and to be enforced only in equity. Boggs v. Wann, 58 Fed. 687; Burnes v. Scott, 117 U. S. 582, 29 L. ed. 991, 6 Sup. Ct. Rep. 865.

In George v. Tate, 102 U. S. 564, 26 L. ed. 232, and Levi v. Mathews, 76 C. C. A. 122, 145 Fed. 154, it is said that to sustain a defense at law that a party was induced to sign a bond or instrument by fraud, that the only fraud permissible to be proved under the plea would be fraud touching the execution of the instrument, such as misreading, false substitution, or obtaining by some trick or device an instrument the party did not intend to give, and proof of fraudulent representations beyond the recitals in the instrument should not be permitted at law. If there be fraud otherwise than that entering into the direct execution of the instrument, it must be met by a direct suit to cancel. Levi v. Mathews, *supra*; Burnes v. Scott, 117 U. S. 582, 29 L. ed. 991, 6 Sup. Ct. Rep. 865; Kosztelnik v. Bethlehem Iron Co. 91 Fed. 606, citing Shampeau v. Connecticut River Lumber Co. 42 Fed. 760, and George v. Tate, 102 U. S. 564, 26 L. ed. 232. See Wallace v. Wilder, 13 Fed. 715; Hartshorn v. Day, 19 How. 211, 15 L. ed. 605; Johnson v. Merry Mount Granite Co. 53 Fed. 569; also Vandervelden v. Chicago & N. W. R. Co. 61 Fed. 54; Ivinston v. Hutton, 98 U. S. 82, 25 L. ed. 67; Stephenson v. Supreme Council, A. L. H. 130 Fed. 492.

These cases unquestionably deny to a defendant in an action at law the right to prove fraud inducing a contract; and, further, where from the nature and continuity of the fraud the only effective relief is cancellation the plea is equitable. Levi v. Mathews, 76 C. C. A. 122, 145 Fed. 154, and authorities cited. However, in Boggs v. Wann, 58 Fed. 686, Judge Taft held it was a good defense to a note sued on at law that the property for which the note was given was worthless and defendant was induced by fraudulent representations to purchase it. Withers v. Greene, 9 How. 213, 13 L. ed. 109; Van Buren v. Digges, 11 How. 461, 13 L. ed. 771.

Again, where fraud is not directly connected with the creation of the contract, such as fraud subsequently perpetrated affecting performance, it is to be remedied in equity, as, for

example, where arbitrators provided for in a policy of insurance fraudulently fix the plaintiff's recovery at more or less than he is entitled to, it cannot be remedied at law. *Levin v. Northwestern Nat. Ins. Co.* 146 Fed. 77; *Wood v. Chicago, S. F. & C. R. Co.* 39 Fed. 52; *Hartshorn v. Day*, 19 How. 211, 15 L. ed. 605; *Hartford F. Ins. Co. v. Bonner Mercantile Co.* 11 L.R.A. 623, 44 Fed. 157; *Robertson v. Scottish Union & Nat. Ins. Co.* 68 Fed. 173.

In suing purchasers at execution sale in ejectment, that the deed under which plaintiff claims was made in fraud of creditors is an equitable defense. *Hawkins v. Wills*, 1 C. C. A. 339, 4 U. S. App. 274, 49 Fed. 506. See *De Guire v. St. Joseph Lead Co.* 38 Fed. 65, contra, and *Lake Superior Ship Canal, R. & Iron Co. v. Cunningham*, 44 Fed. 832, holding, if the title be void it may be set up in defense at law.

In *Kilgore v. Norman*, 119 Fed. 1006, in an action of ejectment, a plea that a deed was executed by an agent without authority is held an equitable plea.

Wherever cancellation or reformation is sought in petition or answer, it at once determines the jurisdiction in equity. *Boggs v. Wann*, 58 Fed. 688; *York City School Dist. v. Ætna Indemnity Co.* 131 Fed. 133; *Pitcairn v. Philip Hiss Co.* 61 C. C. A. 657, 125 Fed. 110; *Schurmeier v. Connecticut Mut. L. Ins. Co.* 69 C. C. A. 22, 137 Fed. 42.

In a suit at law, where a release is pleaded, the plaintiff may reply it was obtained by fraud, whether in the execution or misrepresentations inducing it. *Hill v. Northern P. R. Co.* 51 C. C. A. 544, 113 Fed. 914; *Wagner v. National L. Ins. Co.* 33 C. C. A. 127, 61 U. S. App. 691, 90 Fed. 395-404; *Lumley v. Wabash R. Co.* 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 73; *Union P. R. Co. v. Harris*, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; *Lamson v. Hutchings*, 55 C. C. A. 245, 118 Fed. 321. See also *Brundige v. Nashville, C. & St. L. R. Co.* 112 Tenn. 526, 81 S. W. 1429; *Union P. R. Co. v. Harris*, 12 C. C. A. 598, 27 U. S. App. 450, 63 Fed. 800; *St. Louis, I. M. & S. R. Co. v. Phillips*, 13 C. C. A. 315, 27 U. S. App. 643, 66 Fed. 40; *Qnebe v. Gulf, C. & S. F. R. Co.* 98 Tex. 6, 66 L.R.A. 734, 81 S. W. 20, 4 Ann. Cas. 545; *International & G. N. R. Co. v. Shuford*, 36 Tex. Civ. App. 251, 81 S. W. 1189-1197.

*Bona Fide Purchaser.*

Bona fide purchasers are special favorites of courts of equity, and the plea is purely equitable, and where the title rests upon it equity alone has jurisdiction to determine it. *United States v. Winona & St. P. R. Co.* 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 960.

The rule is unquestionable that an equitable title cannot be litigated in a court of law, either as a cause of action or as a defense. *Foster v. Mora*, 98 U. S. 428, 25 L. ed. 192; *Highland Boy Gold Min. Co. v. Strickley*, 54 C. C. A. 186, 116 Fed. 852; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; *Davis v. Davis*, 18 C. C. A. 438, 30 U. S. App. 723, 72 Fed. 83; *Johnson v. Christian*, 128 U. S. 382, 32 L. ed. 414, 9 Sup. Ct. Rep. 87; *Mulqueen v. Schlichter Jute Cordage Co.* 108 Fed. 931; *Lerma v. Stevenson*, 40 Fed. 359; *Schoolfield v. Rhodes*, 27 C. C. A. 95, 49 U. S. App. 486, 82 Fed. 155.

As stated before, the strict legal title alone can prevail at law. (*Ibid.*; *Daniel v. Felt*, 100 Fed. 728; *Schoolfield v. Rhodes*, 27 C. C. A. 95, 49 U. S. App. 486, 82 Fed. 155; *Foster v. Mora*, 98 U. S. 428, 25 L. ed. 191; *Hickey v. Stewart*, 3 How. 750, 11 L. ed. 814; *Bouldin v. Phelps*, 30 Fed. 560; *Carter v. Ruddy*, 166 U. S. 496, 41 L. ed. 1091, 17 Sup. Ct. Rep. 640); or prior possession against a trespasser (*Wilson v. Fine*, 38 Fed. 792).

By decisions in Texas it is declared that the equity of a bona fide purchaser is a legal right by force of the statute of registration. *Key v. La Pice*, 88 Tex. 211, 212, 30 S. W. 867. Yet this cannot affect or withdraw from the jurisdiction of a Federal equity court the right to hear and determine the plea when set up either offensively or defensively.

Thus our decisions declare a located land certificate a legal right; yet if necessary to set it up in a Federal court of equity, either as a basis of title or to protect one's title, equity alone has jurisdiction to entertain it. *Scott v. Neely*, 140 U. S. 111, 35 L. ed. 360, 11 Sup. Ct. Rep. 712, and authorities cited; *Schoolfield v. Rhodes*, 27 C. C. A. 95, 49 U. S. App. 486, 82 Fed. 153.

In *Lee v. Wysong*, 63 C. C. A. 483, 128 Fed. 839, where plaintiff brought suit on a legal title, and defendant also had a legal title, both claiming from common source, the plaintiff was

allowed to prove he was a bona fide purchaser, not to establish an equitable title, but to support his legal title; that is, to show that with his legal title he had the better equitable title. See *Stone v. Perkins*, 85 Fed. 620. The court refused to permit plaintiff to support his title by an equitable estoppel.

It has been argued that a bona fide purchaser is protected by force of the equitable estoppel that arises from the conduct of the party estopped, and that as an equitable estoppel can be pleaded in a law court, so can a plea of bona fide purchaser be set up at law; but while in the nature of an equitable estoppel it is not of that character of estoppel permitted to be pleaded at law, and does not come within the test set up by courts to determine whether the estoppel can be plead or not at law.

(See Equitable Estoppel.)

#### *Exceptions to the Rule.*

In tracing the history of the departure from the old rule that all equitable defenses of every character must be set up in equity, you will see, as said in *Cleveland v. Cleveland, C. C. & St. L. R. Co.* 93 Fed. 123, that *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618, and *Kirk v. Hamilton*, 102 U. S. 68, 26 L. ed. 79, were among the first cases in which the Supreme Court "loosened its ancient moorings" by permitting equitable defenses to be pleaded at law, but these and subsequent cases cited in *Cleveland v. Cleveland, C. C. & St. L. R. Co.* supra, will show what character of equitable pleas will be permitted at law,—and especially is this true of equitable estoppel, which I am about to discuss.

#### *Equitable Estoppel.*

The general rule can be stated as follows: Equitable estoppel can be pleaded at law. *Kirk v. Hamilton*, 102 U. S. 68, 26 L. ed. 79; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618; *Cheatham v. Edgefield Mfg. Co.* 131 Fed. 120, 121, and authorities cited; *Kellogg-Mackay-Cameron Co. v. Harve Hotel Co.* 97 C. C. A. 415, 173 Fed. 254, and authorities cited; National

Nickel Co. v. Nevada Nickel Syndicate, 50 C. C. A. 113, 112 Fed. 46; Anglo-American Land, Mortg. & Agency Co. v. Lombard, 68 C. C. A. 89, 132 Fed. 733; and Deguire v. St. Joseph Lead Co. 38 Fed. 66. And may be pleaded in an action of ejectment, trespass, or conversion. Campbell v. Golden Cycle Min. Co. 73 C. C. A. 260, 141 Fed. 610; Allen v. Seawell, 17 C. C. A. 217, 37 U. S. App. 436, 70 Fed. 561.

I think it will be seen, in these cases establishing the rule, that where the estoppel is the direct result of the conduct of the plaintiff inducing the defendant to act, then estoppel may be pleaded at law. There must be knowledge on the part of the one against whom it is pleaded, and an element of intent.

To illustrate: Where one stands by, and by silence, when it is his duty to speak, causes another to act to his injury, or by acts, declarations, or otherwise induces another designedly to alter his position, so that it would be actually or constructively fraudulent to permit him to set up a different state of facts. Berry v. Seawall, 13 C. C. A. 101, 31 U. S. App. 30, 65 Fed. 753; Allen v. Seawell, 17 C. C. A. 217, 37 U. S. App. 436, 70 Fed. 561.

In the Texas courts, in trespass to try title, equitable defenses must be pleaded to be proven as a defense. Smith v. Olivari, — Tex. Civ. App. —, 127 S. W. 235.

#### *Offset and Counterclaim.*

In Texas, whenever a suit shall be brought for the recovery of any debt due by judgment, bond, bill, or otherwise, the defendant shall be permitted to plead any counterclaim, subject to such limitations as may be prescribed by law. Batt's Rev. Stat. 750. The counterclaim must state the nature and several items thereof. Rev. Stat. 751, 1266. As to replication by plaintiff, see Rev. Stat. 1192.

The limitations are stated as follows: That you cannot set off a debt against a claim for unliquidated damages or vice versa, when founded on tort or breach of covenant. Rev. Stat. 754. But by article 755 it is provided that nothing stated in the preceding articles shall prohibit the defendant from pleading in set-off any counterclaim founded on a cause of action arising out of,

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or incident to, or connected with plaintiff's cause of action. This last clause was inserted by the codifiers in 1879. See *Scalf v. Tompkins*, 61 Tex. 479; *Hoskins v. Huling*, 2 Tex. App. Civ. Cas. (Willson) 142; *Sterrett v. Houston*, 14 Tex. 157.

The connection with the original cause should be shown in the pleadings. *Castro v. Gentiley*, 11 Tex. 31; *Carothers v. Thorp*, 21 Tex. 361; *Evans v. Bell*, 45 Tex. 553; *Beckham v. Hunter*, 37 Tex. 551.

Having now stated the State statute as to set-offs and counter-claims, let us see how the Federal courts regard them.

In *Frick v. Clements*, 31 Fed. 542, it is said a set-off may be pleaded in the Federal courts in actions at law in any State when that plea is permissible by the laws of the State; and in *Partridge v. Phoenix Mut. L. Ins. Co.* 15 Wall. 580, 21 L. ed. 230, it is said defendants can avail themselves of set-off permitted by statute in the same form and in the same suits as in State courts. *Bull v. First Nat. Bank*, 14 Fed. 614; *Dushane v. Benedict*, 120 U. S. 639-648, 30 L. ed. 811-814, 7 Sup. Ct. Rep. 696; *Iowa & C. Land Co. v. Temescal Water Co.* 95 Fed. 320; *Yardley v. Clothier*, 49 Fed. 337; *Charnley v. Sibley*, 20 C. C. A. 157, 34 U. S. App. 705, 73 Fed. 982; *Fidelity Ins. Trust & S. D. Co. v. Mechanics' Sav. Bank*, 56 L.R.A. 228, 38 C. C. A. 193, 97 Fed. 303; *Dexter, H. & Co. v. Sayward*, 51 Fed. 731; *Wheeling Bridge & Terminal R. Co. v. Cochran*, 15 C. C. A. 321, 25 U. S. App. 306, 68 Fed. 144; *Iowa & C. Land Co. v. Temescal Water Co.* 95 Fed. 320.

While the language of the cases cited is broad, yet it is evident that when the nature of the counterclaim is equitable, as shown by the answer, it cannot be maintained on the law side.

Thus in *Charnley v. Sibley*, 20 C. C. A. 157, 34 U. S. App. 705, 73 Fed. 982, it is said the right of set-off, except as enforced in equity, is a matter of local legislation, and the Federal courts will follow the State decisions in the State where sitting.

So in *Jewett Car Co. v. Kirkpatrick Constr. Co.* 107 Fed. 622, it is said State statutes creating new rights or defenses must be enforced in the Federal courts according to their nature,—if legal on the law side; if equitable, on the equity side.

In *Snyder v. Pharo*, 25 Fed. 398, it is said that the distinc-

tion observed in the Federal courts between law and equity, in remedies, pleading, and practice, forbids entertaining a plea of set-off, when a purely equitable defense, to an action at law, as on a promissory note, though allowed in the state where made. Crissey v. Morrill, 60 C. C. A. 460, 125 Fed. 878; Anglo-American Land, Mortg. & Agency Co. v. Lombard, 68 C. C. A. 89, 132 Fed. 732.

In Williams v. Neely, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1, an equitable reason was given for not paying in full a note sued on which was given for land, because of breach of warranty against encumbrances. This was held to be an equitable plea; and an injunction would issue to stay the action at law on the note until the right to reduce the amount on equitable grounds arising out of the same transaction was enforced in equity. And this would be the case whenever the remedies of the law are less certain, prompt, and efficient to attain the ends of justice in the particular case,—as, for instance, where parties require the title of land for which the note was given to be perfected by the court and the litigation closed, or where there is serious danger of unjustifiable loss which a court of law cannot prevent. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 615, 38 L. ed. 571, 14 Sup. Ct. Rep. 710; Davis v. Wakelee, 156 U. S. 688, 39 L. ed. 584, 15 Sup. Ct. Rep. 555; Brown v. Arnold, 67 C. C. A. 125, 131 Fed. 723; Church v. Spiegelburg, 31 Fed. 601.

In Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148, it is said the equity rule of set-off will be allowed where mutual obligations have grown out of the same transaction, and in a suit upon a note where the payee is insolvent.

So courts of equity have original jurisdiction to set off judgments between the same parties. Alston v. Loy, 96 C. C. A. 578, 172 Fed. 90.

#### *Insolvency as an Equity in Set-off.*

Again, where a party against whom a set-off or counterclaim is pleaded is insolvent, it becomes a matter for equitable jurisdiction. North Chicago Rolling Mill Co. v. St. Louis Ore &

Steel Co. 152 U. S. 616, 38 L. ed. 572, 14 Sup. Ct. Rep. 710; Rue v. Miller, 59 C. C. A. 676, 124 Fed. 208; Scott v. Armstrong, 46 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; Schuler v. Israel, 120 U. S. 510, 30 L. ed. 708, 7 Sup. Ct. Rep. 648; Charnley v. Sibley, 20 C. C. A. 157, 34 U. S. App. 705, 73 Fed. 982; Norton v. Wochler, 31 Tex. Civ. App. 522, 72 S. W. 1025. See Montgomery Water Power Co. v. Chapman, 128 Fed. 197; Moore v. Vogel, 22 Tex. Civ. App. 235, 54 S. W. 1063.

So, the nonresidence of a party against whom a set-off is asserted is good ground for equitable relief. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 617, 38 L. ed. 572, 14 Sup. Ct. Rep. 710.

We see, then, that where there are mutual claims, and both claim and defense are cognizable in law, and there is no necessity for an accounting, apportionment, or equitable adjustment of the claims, the defense can be made at law.

That is, if the counterclaim is equivalent to the recoupment of the common law, as, where the matter set up only tends to reduce the plaintiff's claim or demand for damages, then you have a legal defense; but if the matters set up are equitable in their nature and of such a character as are properly presented by a cross bill in chancery, then only a court of equity can entertain the plea. Jewett Car Co. v. Kirkpatrick Constr. Co. 107 Fed. 622; Herklotz v. Chase, 32 Fed. 433.

In Jewett Car Co. v. Kirkpatrick Constr. Co. 107 Fed. 622, it is said a counterclaim that seeks affirmative relief must be pursued on the equity side, as affirmative relief can only be obtained by a cross bill.

#### *Effect of Judgment at Law on Equitable Plea.*

We have so far seen that a purely equitable defense cannot be set up on the law side of the Federal courts, and especially in actions of ejectment, where the strict legal title must prevail. In such cases the distinction between law and equity is a matter of substance, and not form, and, as said in Levi v. Mathews, 76 C. C. A. 122, 145 Fed. 154, and authorities there cited, the distinction cannot be waived, and courts should act on their own

motion where parties get on the wrong side of the court; as, where a legal action simply to recover the land is brought on the equity side, or an equitable title made the basis of a suit on the law side. U. S. Rev. Stat. § 723, U. S. Comp. Stat. 1901, p. 583; Beatty v. Wilson, 161 Fed. 458. But while this is true, yet an objection to a decree in equity because a complainant had a complete remedy at law will not be heard by an appellate court. Preteca v. Maxwell Land Grant Co. 1 C. C. A. 607, 4 U. S. App. 326, 50 Fed. 674, 676; Cook v. Foley, 81 C. C. A. 237, 152 Fed. 42; Tyler v. Savage, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 834, 9 Sup. Ct. Rep. 486; Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127.

Again, the proposition that after an equitable plea has been acted on in a suit at law and judgment entered, it will not be set aside on that account, is equally sustained by the reasons given in the authorities above cited. Union P. R. Co. v. Harris, 12 C. C. A. 598, 27 U. S. App. 450, 63 Fed. 800; St. Louis, I. M. & S. R. Co. v. Phillips, 13 C. C. A. 315, 27 U. S. App. 643, 66 Fed. 40; Schoolfield v. Rhodes, 27 C. C. A. 95, 49 U. S. App. 486, 82 Fed. 157.

Again, a court of law, because judgment is entered on an equitable plea when issue is not raised, is no precedent in similar cases where the issue is raised.

The equitable doctrine of subrogation cannot be applied in a law case. United States use of Wood v. United Surety Co. 192 Fed. 992.

#### *Pleading Limitations.*

By section 721, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 581, the laws of the several States, when not otherwise provided by Federal laws, shall be regarded as rules of decision in trials at common law, in courts of the United States, when they apply.

It has been uniformly held that the statutes of limitations are embraced within this act. Banserman v. Blunt, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; Campbell v. Haverhill, 155 U. S. 614, 39 L. ed. 281, 15 Sup. Ct. Rep. 217; Bullion & E. Bank v. Hegler, 93 Fed. 892. Especially is this the case

when these statutes are a rule of property, as in cases of real estate, where the statute confers title on one holding adversely for the statutory period. *Elder v. McClaskey*, 17 C. C. A. 251, 37 U. S. App. 1, 199, 70 Fed. 538 and cases cited. The general rule is, the Federal courts apply the statutes of limitation as prescribed by local law, and even when the action is brought on some right given by an act of Congress, and exclusively in the jurisdiction of the Federal courts. *Cheatham v. Evans*, 87 C. C. A. 576, 160 Fed. 802; *Campbell v. Haverhill*, 155 U. S. 614-616, 39 L. ed. 281, 282, 15 Sup. Ct. Rep. 217; *Brady v. Daly*, 175 U. S. 158, 44 L. ed. 113, 20 Sup. Ct. Rep. 62; *Gabrielson v. Waydell*, 67 Fed. 343; *Thompson v. German Ins. Co.* 76 Fed. 893. See *Campbell v. New York*, 81 Fed. 183; *Cockrill v. Butler*, 78 Fed. 682. However, in *Campbell v. Haverhill*, 155 U. S. 614-616, 39 L. ed. 281, 282, 15 Sup. Ct. Rep. 217, it is said the Federal courts may refuse to enforce an unreasonable statute (p. 651). See also *United States v. Banister*, 70 Fed. 45. While it is said the statute of limitations is governed by *lex fori*, as it affects the remedy only (*Bullion & E. Bank v. Hegler*, 93 Fed. 894; *Campbell v. Haverhill*, 155 U. S. 618, 39 L. ed. 283, 15 Sup. Ct. Rep. 217; *Brunswick Terminal Co. v. National Bank*, 88 Fed. 610; *Underwood v. Patrick*, 36 C. C. A. 330, 94 Fed. 471), yet it is said in *Davis v. Mills*, 194 U. S. 454, 48 L. ed. 1070, 24 Sup. Ct. Rep. 692 "that where the source of the obligation is in a foreign law, the defendant is entitled to the benefit of whatever limitations the foreign law creates." This applies where the statute creating the right limits the time within which the suit shall be brought or the time after which the remedy is barred; in such cases it goes to the right created and accompanies the obligation. *Brunswick Terminal Co. v. National Bank*, 88 Fed. 610.

Limitations must be specially pleaded, is the universal rule, as it is simply a privilege; but the statute controls the Federal courts as to setting up as a defense. *Gormley v. Bunyan*, 138 U. S. 623, 34 L. ed. 106, 11 Sup. Ct. Rep. 453; *Hagstoz v. Mutual L. Ins. Co.* 179 Fed. 569.

However, when the statement of plaintiff's claim or cause of action shows that the defense of limitation could not be avoided, then you may meet the issue by demurrer. *Davis v. Mills*, 58 C. C. A. 123, 121 Fed. 703.

## CHAPTER VIII.

### AMENDMENT OF PLEADINGS.

By section 954, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 696, no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter of law shall appear to it, without regard to such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleading, upon such conditions as it shall in its discretion and by its rules prescribe.

Congress having thus legislated and conferred upon the Federal courts the power to allow amendments to pleadings, the power is exercised by them independently of State statutes, and they are not required to follow State practice in their construction of local statutes governing amendments of pleadings. *Ex parte Fiske*, 113 U. S. 721, 28 L. ed. 1120, 5 Sup. Ct. Rep. 724; *Manitowoc Malting Co. v. Fuechtwanger*, 169 Fed. 983; *McDonald v. Nebraska*, 41 C. C. A. 278, 101 Fed. 171, 177; *DeVall DaCosta v. Southern P. Co.* 167 Fed. 654; *Mexican C. R. Co. v. Duthie*, 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610; *Oliver v. Raymond*, 108 Fed. 927; *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 752.

It is said the act invests the Federal courts with plenary power to remove by amendment all impediments to the attainment of justice (*Ibid.*), and is in no way limited by the conformity act (*Ibid.*; *Kent v. Bay State Gas Co.* 93 Fed. 887; *Rio Grande Dam & Irrig. Co. v. United States*, 215 U. S. 276, 54 L. ed. 194, 30 Sup. Ct. Rep. 97; *Hardin v. Boyd*, 113 U. S. 756-761, 28 L. ed. 1141, 1142, 5 Sup. Ct. Rep. 771); and applies to both

suits at law and equity (*Dancel v. United Shoe Machinery Co.* 120 Fed. 839).

It is entirely within their power to amend any of the pleadings in a case, before, during, and after the trial, so as to conform the pleading to the proof; and indeed every step in the case, from the process to the verdict and judgment. *McDonald v. Nebraska*, 41 C. C. A. 278, 101 Fed. 177, and cases cited; *Bamberger v. Terry*, 103 U. S. 43, 26 L. ed. 317; *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 752; *McKenny v. Supreme Lodge*, A. O. U. W. 104 C. C. A. 117, 180 Fed. 967. It is entirely discretionary and not reviewable, unless there is a gross abuse of discretion. *Lange v. Union P. R. Co.* 62 C. C. A. 48, 126 Fed. 339; *United States v. Lehigh Valley R. Co.* 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; *Rucker v. Bolles*, 67 C. C. A. 30, 133 Fed. 860 and cases cited; *Loeb v. Eastman Kodak Co.* 106 C. C. A. 142, 183 Fed. 705; *Stillwagon v. Baltimore & O. R. Co.* 86 C. C. A. 287, 159 Fed. 97, 98; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 198, 37 L. ed. 701, 13 Sup. Ct. Rep. 859, and cases cited; *Kent v. Bay State Gas Co.* 93 Fed. 887.

Again, while the Federal courts, as to amendment of pleadings, have a law unto themselves, they will apply the State law if consistent with the justice of the case. See *Haunum v. Jerome*, 184 Fed. 179; *Hall v. Louisville & N. R. Co.* 157 Fed. 464-466; *VanDoren v. Pennsylvania R. Co.* 35 C. C. A. 282, 93 Fed. 269.

#### *'Amending the Petition.'*

Having in view the construction of the statute relating to the amendment of pleadings as above given, it is apparent that the petition can be amended at any time before trial, or in fact at any step of the proceeding, either as to defects of form, parties, jurisdictional averments, or in the statement of the cause of action.

#### *'As to Parties.'*

Of course, misnomer may be corrected by amendment or you may amend by striking out parties.

Where by statute of the State the party in whom the legal interest is vested may sue, you may substitute the nominal plaintiff with the real one. McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 171; Franklin v. Conrad-Stanford Co. 70 C. C. A. 171, 137 Fed. 737.

Again, you may change by amendment the capacity in which a party sues, as from administrator or representative suit to a personal suit. Van Doren v. Pennsylvania R. Co. 35 C. C. A. 282, 93 Fed. 260. But an amendment changing the beneficiary in the action is in effect the beginning of a new suit. Hall v. Louisville & N. R. Co. 157 Fed. 465-469, and cases cited; Land Co. v. Elkins, 22 Blatchf. 204, 20 Fed. 546.

Amending the petition relates back. St. Louis & S. F. R. Co. Loughmiller, 193 Fed. 690.

#### *Jurisdictional Averments.*

Mistakes as to jurisdictional averments may be amended at any time, even after appeal, as we shall see, as such averments are not excepted under the statute. Re Plymouth Cordage Co. 68 C. C. A. 434, 135 Fed. 1003; Carnegie v. Hulbert, 16 C. C. A. 498, 36 U. S. App. 81, 70 Fed. 210; Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 305; Goodman v. Ft. Collins, 91 C. C. A. 98, 164 Fed. 972, and cases cited; First State Bank v. Haswell, 98 C. C. A. 217, 174 Fed. 211. See Simkins, Federal Equity Suit, 2d ed. p. 359, for further authorities. Thompson v. Automatic Fire Protection Co. 151 Fed. 945, amending as to amount. See also Atchison, T. & S. F. R. Co. v. Gilliland, 193 Fed. 608; Mexican C. R. Co. v. Duthie, 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610.

#### *Amending the Cause of Action.*

The right to amend the statement of your cause of action so as to expand it, or correct errors of statement, is unquestionably the general rule, either under Federal or State practice. As said, the Federal courts have plenary powers under section 954 of U. S. Rev. Stat. to remove by amendment all impediments to the attainment of justice in the particular case. McDonald v.

Nebraska, 41 C. C. A. 278, 101 Fed. 171; Rio Grande Dam & Irrig. Co. v. United States, 215 U. S. 275, 54 L. ed. 194, 30 Sup. Ct. Rep. 97; Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; Kent v. Bay State Gas Co. 93 Fed. 889.

There are, however, recognized exceptions to the general rule. For example, the right to recover on any cause of action depends on its existence at the inception of the suit, for the nonexistence of a cause of action then cannot be cured by amendment pending the suit. American Bonding & T. Co. v. Gibson County, 76 C. C. A. 155, 145 Fed. 874, 7 Ann. Cas. 522, and cases cited. See same case, 62 C. C. A. 397, 127 Fed. 671.

Again, you cannot repudiate a special contract upon which suit was brought, by adding by amendment a new and distinct cause of action inconsistent with the first. Thus, you cannot change by amendment a suit on contract for one in tort. Inman & Co. v. Seaboard Air Line Co. 159 Fed. 965; Oliver v. Raymond, 108 Fed. 927; Metropolitan Nat. Bank v. St. Louis Dispatch Co. 38 Fed. 58.

You may, however, set up by amendment an additional cause of action of the same nature and arising out of the same course of transactions as in the original complaint. Oliver v. Raymond, 108 Fed. 927; Rio Grande Dam & Irrig. Co. v. United States, 215 U. S. 275, 54 L. ed. 193, 30 Sup. Ct. Rep. 97.

While you may expand, you cannot change, the original cause of action by amendment, which in effect makes a new and different suit. The Ask, 156 Fed. 678-681; Savage v. Worsham, 104 Fed. 19; Oliver v. Raymond, 108 Fed. 928; Land Co. v. Elkins, 22 Blatchf. 204, 20 Fed. 545; Maynard v. Green, 30 Fed. 644; Judson v. Courier Co. 25 Fed. 705.

#### *Amending the Petition to Conform to the Proof.*

It is within the discretion of the Federal courts to amend the complaint during the trial to conform to the evidence, where the facts alleged and the relief prayed for are the same (Hoogendorn v. Daniel, 102 C. C. A. 213, 178 Fed. 765); and whether the State law or practice permits or forbids it (Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 987, 988, and cases cited. Van

Doren v. Pennsylvania R. Co. 35 C. C. A. 282, 93 Fed. 260. See Simkins, *Federal Equity Suit*, 2d ed. pp. 356, 357, and cases cited). Thus, in *Davis v. Kansas City, S. & M. R. Co.* 32 Fed. 863, the *ad damnum* clause was amended to save the jurisdiction of the court; and in *Manitowoc Malting Co. v. Fuechtwanger*, 169 Fed. 987, the same clause was amended to conform to the proofs. In *Snare & T. Co. v. Friedman*, — L.R.A.(N.S.) —, 94 C. C. A. 369, 169 Fed. 1, an amendment alleging a different act of negligence was permitted, to conform to the evidence.

Amendments are frequently allowed where the averments of the complaint were not sufficient to support the full relief which the plaintiff was entitled to under the evidence in the case. *Coulter v. Independent Order of Foresters*, 166 Fed. 805; *Johnson v. Crawford*, 144 Fed. 905; *Greene v. Freund*, 80 C. C. A. 387, 150 Fed. 721. As said in *Mathieson Alkali Works v. Mathieson*, 80 C. C. A. 129, 150 Fed. 244, these amendments are permitted to promote substantial justice, and it is a common practice,—citing *Mack v. Porter*, 18 C. C. A. 527, 25 U. S. App. 595, 77 Fed. 236, and *Chapman v. Barney*, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426. These cases indicate the liberality of the court in granting amendments at any stage of the proceeding at law; but it will be further observed that the rights of the defendant will be protected by not permitting such amendments as will surprise or prejudice him. *Great Northern R. Co. v. Herron*, 68 C. C. A. 599, 136 Fed. 51.

#### *Effect of the Amended Complaint.*

The amended complaint relates back to the filing of the original petition (*Campbell v. Johnson*, 92 C. C. A. 554, 167 Fed. 102; *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 752), subject, however, to yield to positive provisions of a statute, and to the legal rights of the defendant, such, for instance, as may arise under the statute of limitations of a State. *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877. The rule has been stated as follows: "An amendment to a petition which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already

propounded, relates back to the commencement of the action and excludes the plea of limitation. But an amendment that introduces a new or different cause of action, making a new or different demand, does not relate back to the filing of the suit so as to stop the running of the statute." Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 308, 309, and cases cited; Hall v. Louisville & N. R. Co. 157 Fed. 467, 468; Crotty v. Chicago, G. W. R. Co. 95 C. C. A. 91, 169 Fed. 593, and cases cited.

Where a portion of a petition was erroneously struck out and exceptions reserved, and afterwards an amended petition was filed, leaving out the averments objected to, such filing did not waive the error, though it was expressly required by the statutes of the State that the courts should consider the error waived. Williamson v. Liverpool & L. & G. Ins. Co. 72 C. C. A. 542, 141 Fed. 55, 5 Ann. Cas. 402; Worthington v. Beeman, 33 C. C. A. 475, 63 U. S. App. 536, 91 Fed. 232. But this would not be rule if the petition was only amended as to some alleged indefiniteness or technical defect of statement. Williamson v. Liverpool & L. & G. Ins. Co. *supra*, p. 57.

#### *Amending the Answer.*

Of course, the amendment of the answer is controlled by the same rules permitting amendments to the petition; it is entirely within the discretion of the court, and not reviewable except when there has been a gross abuse of discretion. U. S. Rev. Stat. 954, U. S. Comp. Stat. 1901, p. 696. Lange v. Union P. R. Co. 62 C. C. A. 48, 126 Fed. 340, 341; Rucker v. Bolles, 67 C. C. A. 30, 133 Fed. 860. And an answer which sets up a new defense materially changing the issues, and which was not offered until after plaintiff had rested, was held to be admissible in the discretion of the court. Alaska Commercial Co. v. Williams, 63 C. C. A. 92, 128 Fed. 362-365.

## CHAPTER IX.

### TRIAL.

#### *Consolidation of Suits.*

By section 921, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 685, it is provided that "when causes of a like nature or relative to the same question are pending before a court of the United States, the court may make such orders and rules concerning proceeding therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so." *Diggs v. Louisville & N. R. Co.* 14 L.R.A. (N.S.) 1029, 84 C. C. A. 330, 156 Fed. 565; *Re Di Clerico*, 158 Fed. 905; *Seawell v. Berry*, 55 Fed. 731; *Denver City Tramway Co. v. Norton*, 73 C. C. A. 1, 141 Fed. 599; *American Window Glass Co. v. Noe*, 86 C. C. A. 133, 158 Fed. 778; It is entirely within the discretionary power of the court, but when consolidated they remain separate as to parties, pleadings, and judgment. *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 155, 95 Fed. 497; *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 293, 36 L. ed. 709, 12 Sup. Ct. Rep. 909. This discretion cannot be controlled by mandamus. *Lewis v. Baltimore & L. R. Co.* 10 C. C. A. 446, 8 U. S. App. 645, 62 Fed. 218. The attention of the court, where the conditions exist, may be invoked by motion, or other suggestion of the facts.

#### *Continuances.*

The granting of continuances in lawsuits should be controlled by State practice, there being no Federal statute on the subject except section 955, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 697, providing that upon the death of either party pending the suit and the executor or administrator of the deceased being made

a party he may continue the cause until the next term; and section 602, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 484, which provides for continuance of all process and pleadings when the office of judge is vacant, unless a judge of another district is appointed to hold the court. Sec. 603. Section 958, U. S. Stat. refers to continuance of suits arising under the postal laws, and sections 957, 959, 960, U. S. Rev. Stat. provides for continuance of suits under the revenue laws. With these exceptions, I am not aware of any Federal legislation on the subject of continuances.

The Federal courts in granting continuances have, however, exercised a very broad discretion without very much reference to State practice or laws; and they hold that being a matter of discretion, their granting or refusing is not reviewable. *Armour & Co. v. Kollmeyer*, 16 L.R.A.(N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78; *Texas & P. R. Co. v. Nelson*, 1 C. C. A. 688, 2 U. S. App. 213, 50 Fed. 815, and cases cited; *Cox v. Hart*, 145 U. S. 376, 36 L. ed. 741, 12 Sup. Ct. Rep. 962; *Dexter v. Kellas*, 51 C. C. A. 35, 113 Fed. 48, and cases cited; *Lyman v. Warner*, 51 C. C. A. 73, 113 Fed. 87; *Means v. Bank of Randall*, 146 U. S. 620, 36 L. ed. 1107, 13 Sup. Ct. Rep. 186; *United States v. Rio Grande Dam & Irrig. Co.* 184 U. S. 422, 423, 46 L. ed. 622, 22 Sup. Ct. Rep. 428, and cases cited; *Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 188, 102 Fed. 96; *United States v. Gibson*, 188 Fed. 396. But in this, as in other cases, there may be an abuse of discretion which is reviewable. *Myers v. Kessler*, 74 C. C. A. 62, 142 Fed. 730; *Fidelity & D. Co. v. Bucki & Son Lumber Co.* 189 U. S. 135, 47 L. ed. 745, 23 Sup. Ct. Rep. 582; see *St. Louis Stave & Lumber Co. v. United States*, 100 C. C. A. 640, 177 Fed. 178; *Levy v. Larson*, 92 C. C. A. 562, 167 Fed. 110. Application because of absence of witnesses and what must be shown as basis for continuance, see *Armour & Co. v. Kollmeyer*, 16 L.R.A.(N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78. On ground of absence of counsel, *Sun Pub. Co. v. Lake Erie Asphalt Block Co.* 84 C. C. A. 584, 157 Fed. 80; *Copper River Min. Co. v. McClellan*, 70 C. C. A. 623, 138 Fed. 333; *Crim v. Handley*, 94 U. S. 652, 24 L. ed. 216. By death of senior counsel, *Rhode Island v. Massachusetts*, 11 Pet. 226, 9 L. ed. 697.

*Taking Nonsuit.*

While the decisions are not harmonious (see *Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 373), yet section 914, U. S. Comp. Stat. 1901, p. 684, by weight of authority controls the dismissal of the case by plaintiff, or taking a nonsuit. Thus, the statutes of Illinois and Indiana permitting a dismissal, or taking a nonsuit by plaintiff at any time before the jury retires, and barring such nonsuit if not so taken, were followed by the Federal courts in those States. *Gassman v. Jarvis*, 94 Fed. 603, *Id.* 100 Fed. 146; *Drummond v. Louisville & N. R. Co.* 109 Fed. 531; *Meyer v. National Biscuit Co.* 94 C. C. A. 335, 168 Fed. 906; *Duffy v. Glucose Sugar Ref. Co.* 141 Fed. 206; *Wolcott v. Studebaker*, 34 Fed. 8; *Connecticut F. Ins. Co. v. Manning*, 101 C. C. A. 107, 177 Fed. 895; *Parks v. Southern R. Co.* 74 C. C. A. 414, 143 Fed. 276; *Central Transp. Co. v. Pullman Palace Car Co.* 139 U. S. 39, 35 L. ed. 61, 11 Sup. Ct. Rep. 478; *Coughran v. Bigelow*, 164 U. S. 308, 41 L. ed. 446, 17 Sup. Ct. Rep. 117. In *Chicago, M. & St. P. R. Co. v. Metalstaff*, 41 C. C. A. 669, 101 Fed. 769, it is said that the Federal courts were bound by the statutes of the State as construed by their courts permitting the plaintiff to dismiss without prejudice or take a nonsuit, as provided by such statutes. *Duffy v. Glucose Sugar Ref. Co.* 141 Fed. 206; *Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 373. Again, in *Russo-Chinese Bank v. National Bank*, 109 C. C. A. 398, 187 Fed. 86, it is said that if the State law permits a nonsuit where the evidence would not sustain a verdict for the plaintiff, the Federal court may do likewise under section 914, U. S. Rev. Stat. *Chicago, M. & St. P. R. Co. v. Metalstaff*, 41 C. C. A. 669, 101 Fed. 769; *Coughran v. Bigelow*, 164 U. S. 308, 41 L. ed. 446, 17 Sup. Ct. Rep. 117; *Union L. Ins. Co. v. Riggs*, 123 Fed. 318; *Randall v. Baltimore & O. R. Co.* 109 U. S. 482, 27 L. ed. 1005, 3 Sup. Ct. Rep. 323. See *Southern P. Co. v. Keeley*, 109 C. C. A. 659, 187 Fed. 939. However, the phrase "as near as may be" in the act leaves it discretionary with the court to grant the nonsuit, or enter judgment for the defendant if the evidence has been taken, and a verdict for the defendant will be ordered if necessary to protect his rights. *Parks v. Southern R. Co.* 74 C. C. A. 414,

143 Fed. 277-279; *Huntt v. McNamee*, 72 C. C. A. 441, 141 Fed. 293.

Where there is sufficient evidence upon which a jury may find a verdict for the plaintiff, then the motion for nonsuit should be denied. *Russo-Chinese Bank v. National Bank*, 109 C. C. A. 398, 187 Fed. 86; *Meehan v. Valentine*, 145 U. S. 618, 36 L. ed. 839, 12 Sup. Ct. Rep. 972. See *Francisco v. Chicago & A. R. Co.* 79 C. C. A. 292, 149 Fed. 359, 9 Ann. Cas. 628.

In *Patting v. Spring Valley Coal Co.* 93 Fed. 99, it is said involuntary nonsuit is not allowed in Federal courts on failure to appear; the proper procedure is to impanel a jury and direct a verdict.

Again, when the element of controversy disappears from the case, either by act of parties or change of circumstances, the plaintiff or judge may dismiss the case. *Lewis Pub. Co. v. Wyman*, 104 C. C. A. 453, 182 Fed. 16; *American Book Co. v. Kansas*, 193 U. S. 49-52, 48 L. ed. 613, 614, 24 Sup. Ct. Rep. 397; *Mills v. Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; *Richardson v. McChesney*, 218 U. S. 489, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43. See *Simkins, Federal Equity Suit*, 2d ed. discussing dismissal by plaintiff, p. 349, chapter LX.; Dismissal by defendant, p. 466; Dismissal by court, p. 574.

*Not Res Adjudicata.*

The judgment of nonsuit by request of plaintiff, dismissing without prejudice, determines no right and is no bar to another suit. *Gardner v. Michigan C. R. Co.* 150 U. S. 356, 37 L. ed. 1109, 14 Sup. Ct. Rep. 140; citing *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99; *Union L. Ins. Co. v. Riggs*, 123 Fed. 318; *Francisco v. Chicago & A. R. Co.* 79 C. C. A. 292, 149 Fed. 357, 9 Ann. Cas. 628.

*Not Reviewable.*

The general rule governing the reviewing of the action of Federal courts is that the right of review depends upon the acts

of Congress and rules of practice of the Federal courts alone. *St. Clair v. United States*, 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002; also see *Ex parte Chateaugay Ore & Iron Co.* 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150. And the practice seems to have been uniform that where the nonsuit has been entered on motion of the plaintiff, though erroneous, the plaintiff cannot appeal. *Francisco v. Chicago & A. R. Co.* 79 C. C. A. 292, 149 Fed. 355, 356, 9 Ann. Cas. 628 and cases cited. But where the judgment is rendered on motion of the defendant against the protest of plaintiff, then the plaintiff can have it reviewed on error without reference to the State law or practice. *Francisco v. Chicago & A. R. Co.* 79 C. C. A. 292, 149 Fed. 354-358, 9 Ann. Cas. 628; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 38-40, 35 L. ed. 60, 61, 11 Sup. Ct. Rep. 478; *Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 372, 373; see *United States v. Baltimore & O. R. Co.* 107 C. C. A. 586, 185 Fed. 486. Where the defendant's motion for a nonsuit is overruled, he waives any right thereunder by introducing his evidence. *Cœur d'Alene Lumber Co. v. Goodwin*, 104 C. C. A. 413, 181 Fed. 951. In *Southern P. Co. v. Kelley*, 109 C. C. A. 659, 187 Fed. 938, the trial was before the court without a jury, and after the finding on the evidence plaintiff was permitted to take a nonsuit and defendant was allowed a writ of error. See also *Chicago, M. & St. P. R. Co. v. Metalstaff*, 41 C. C. A. 669, 101 Fed. 769; and *Connecticut F. Ins. Co. v. Manning*, 101 C. C. A. 107, 177 Fed. 896.

S. S. at L.—5.

## CHAPTER X.

### TRIAL BY JURY.

The Constitution of the United States guarantees a trial by jury in the courts of law, where the value in controversy exceeds the sum of twenty dollars. 7th Amend. U. S. Const. Jones v. Mutual Fidelity Co. 123 Fed. 506. This guaranty only applies to the Federal courts. Ex parte Brown, 140 Fed. 461. Under this guaranty Congress created the right in the following sections of the United States Revised Statutes: By sections 648, 566, U. S. Comp. Stat. 1901, pp. 525, 461, it is provided, that the trials of issues of fact in the circuit and district courts of the United States shall be by jury, except in cases of equity, admiralty, and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section. Low v. United States, 94 C. C. A. 1, 169 Fed. 86. This last clause refers to section 649, providing for trial by the court without the intervention of a jury, hereafter to be referred to. The "jury" means the jury of twelve men as known to the common law. Any less number, unless specially provided by act of Congress, would be invalid. Capital Traction Co. v. Hof, 174 U. S. 13, 14, 43 L. ed. 877, 878, 19 Sup. Ct. Rep. 580; Maxwell v. Dow, 176 U. S. 586, 44 L. ed. 599, 20 Sup. Ct. Rep. 448, 494.

### *Organization of Juries.*

Chapter 12 of the New Judicial Code, which went into effect January 1, 1912, provides for the qualification of jurors, how drawn, how to be apportioned in the district, the issuing and service of the venire, and the summoning of talesmen to complete the jury when necessary. New Judicial Code, secs. 275, 281.

The qualification and exemptions are controlled by the requirements of the State laws (New Code, sec. 275), except no person can serve on a petit jury more than one term in a year.

See *Walker v. Collins*, 1 C. C. A. 642, 4 U. S. App. 406, 50 Fed. 739, and *United States v. Breeze*, 172 Fed. 765.

### *Challenges in Civil Cases.*

Three peremptory challenges are permitted, without reference to the number of plaintiffs or defendants. Challenges, when made for cause or favor, are to be tried by the court only. New Judicial Code, sec. 287, formerly sec. 819, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 629. *Walker v. Collins*, 1 C. C. A. 642, 4 U. S. App. 406, 50 Fed. 739. A challenge for cause is not reviewable unless discretion abused. *Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 188, 102 Fed. 96.

### *Talesmen.*

When from challenges or otherwise the panel of the petit jury is exhausted before completion of the jury to try the case, the marshal or his deputy, by order of the court, shall return jurymen from the bystanders to complete the panel. The court may appoint some disinterested person to summon talesmen, should the marshal or his deputy be interested in the case. New Judicial Code, sec. 280.

### *Nature of the Case to be Tried.*

As seen by the Federal Constitution, the trial by jury is preserved in all cases at law when the value of the subject-matter in controversy exceeds the sum of twenty dollars. By section 723, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 583, now embodied in section 267 of the New Judicial Code, courts of law have exclusive jurisdiction where a plain, adequate, and complete remedy at law may be had. So, where the direct object of the suit is the judicial ascertainment of the existence and amount of a pecuniary legal demand, or the recovery of specific real or personal property, and the enforcement of any judgment that may be rendered, the parties have a right of trial by jury, unless waived as will hereafter be stated, of all issues of fact that may arise in such cases. *Low v. United States*, 94 C. C. A. 1, 169

Fed. 86. And we will see hereafter that unless the facts are found by a jury by general or special verdict, no question of law, except those arising upon the process, pleadings, or the judgment, can be reviewed by an appellate court. *Campbell v. Boyreau*, 21 How. 223, 16 L. ed. 96.

*Withdrawing the Case from the Jury.*

While it is the province of the jury to pass upon the weight and credibility of the evidence, and not the judge (*Wichita R. & Light Co. v. Dulaney*, 86 C. C. A. 397, 159 Fed. 417; *Newburger Cotton Co. v. York Cotton Mills*, 81 C. C. A. 524, 152 Fed. 398), yet if there is no evidence to support the allegations, but direct evidence against it, the court may instruct a verdict. So, if the evidence is such that after allowing all justifiable inferences it would not support a verdict, then the court may instruct a verdict. *McGuire v. Blount*, 199 U. S. 142, 50 L. ed. 125, 26 Sup. Ct. Rep. 1; *Turnbull v. Ross*, 72 C. C. A. 609, 141 Fed. 649; *Southern R. Co. v. Hardin*, 85 C. C. A. 329, 157 Fed. 645; *National Asso. v. Scott*, 83 C. C. A. 652, 155 Fed. 92; *Kallas v. Worth Bros. Co.* 158 Fed. 1018; *Woodward v. Chicago, M. & St. P. R. Co.* 75 C. C. A. 591, 145 Fed. 577; *Guild v. Pringle*, 76 C. C. A. 192, 145 Fed. 312; *Berry v. Chase*, 77 C. C. A. 161, 146 Fed. 626; *Gentry v. Singleton*, 63 C. C. A. 231, 128 Fed. 679; *Union P. R. Co. v. Lucas*, 69 C. C. A. 218, 136 Fed. 374; *International Text-Book Co. v. Heartt*, 69 C. C. A. 127, 136 Fed. 129; *Postal Teleg. Cable Co. v. Grantham*, 109 C. C. A. 370, 187 Fed. 52; *Pennsylvania R. Co. v. Martin*, 55 L.R.A. 361, 49 C. C. A. 474, 111 Fed. 586; *Norfolk & P. Traction Co. v. Rephan*, 110 C. C. A. 254, 188 Fed. 277; *Patillo v. Allen-West Commission Co.* 65 C. C. A. 508, 131 Fed. 680. (See Verdict.)

The "scintilla of evidence rule" does not apply to the Federal courts in determining whether the case be withdrawn from the jury by instructing a verdict. *Ozanne v. Illinois C. R. Co.* 151 Fed. 900. The case presented by the evidence must be such that different minds may reach a different conclusion on disputable facts, to prevent the withdrawal of the case from the jury. *Teis v. Smuggler Min. Co.* 15 L.R.A.(N.S.) 893, 85 C. C. A. 478,

158 Fed. 261; Minahan v. Grand Trunk Western R. Co. 70 C. C. A. 463, 138 Fed. 37; Chicago G. W. R. Co. v. Roddy, 65 C. C. A. 470, 131 Fed. 712; L. J. Mueller Furnace Co. v. Cascade Foundry Co. 76 C. C. A. 286, 145 Fed. 596.

The question of the sufficiency of evidence is one of law for the court. United States Fidelity & G. Co. v. Woodson County, 76 C. C. A. 114, 145 Fed. 151; Crookston Lumber Co. v. Boutin, 79 C. C. A. 368, 149 Fed. 680; Shoup v. Marks, 62 C. C. A. 540, 128 Fed. 32. (See Directing Verdict.)

*Effect When Both Parties Ask Instructions.*

In Beuttell v. Magone, 157 U. S. 155, 39 L. ed. 655, 15 Sup. Ct. Rep. 566, it is said that where both parties request peremptory instructions, it is equivalent to a request to the court to find the facts; and a direction by the court to find for one party or the other is a finding for the party for whom the instruction was given, and both are concluded by the finding (Bradley Timber Co. v. White, 58 C. C. A. 55, 121 Fed. 780; McCormick v. National City Bank, 73 C. C. A. 350, 142 Fed. 132, 6 Ann. Cas. 544; Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. 77 C. C. A. 601, 147 Fed. 459, and cases cited; Bankers' Mut. Casualty Co. v. State Bank, 80 C. C. A. 32, 150 Fed. 78, and cases cited), unless there is no evidence to support the finding (Mead v. Chesbrough Bldg. Co. 81 C. C. A. 184, 151 Fed. 998, it is equivalent to saying that there is no disputed question of fact to control the law (West v. Roberts, 68 C. C. A. 58, 135 Fed. 350), or that the trial judge find the facts (Mead v. Darling, 86 C. C. A. 552, 159 Fed. 684). (See Directing Verdict.) In Insurance Co. of N. A. v. Wisconsin C. R. Co. 67 C. C. A. 300, 134 Fed. 798, it is said in such cases, after the court's decision the party cannot demand the submission of the case to the jury. Rainy Lake River Boom Corp. v. Rainy River Lumber Co. 89 C. C. A. 267, 162 Fed. 287. This rule is applicable only when both parties request an instruction and do nothing more, and the court finds for one or the other. In Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. 210 U. S. 8, 9, 52 L. ed. 936, 937, 28 Sup. Ct. Rep. 607, 15 Ann. Cas. 70, the court in reviewing the decision in 77 C. C. A. 601, 147 Fed.

459, says "that nothing in the ruling in Beuttell v. Magone, supra, sustains the view, that a party asking a peremptory instruction may not, on the refusal of the court, insist, by appropriate request, upon the submission of the case to the jury, where the evidence is conflicting, or inferences to be drawn from the evidence are divergent,"—citing Minahan v. Grand Trunk Western R. Co. 70 C. C. A. 463, 138 Fed. 37, and McCormick v. National City Bank, 73 C. C. A. 350, 142 Fed. 132, 6 Ann. Cas. 544. In the last case, by way of illustration, it is said "a party may believe that a certain fact proven may entitle him to a verdict, but there may be other controverted facts which if proven entitle him to a verdict. It cannot be that, the court refusing a peremptory instruction as asked, he cannot then ask submission to the jury to determine other disputable facts which would entitle him to a verdict if found in his favor." This statement of the rule is approved by the supreme court in reviewing the case as stated above.

#### *Permitting the Jury to Separate.*

Permitting the jury to separate after the charge given is entirely within the discretion of the court, and State rules or Codes do not apply. Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co. 66 C. C. A. 543, 133 Fed. 713-716. This power falls within the administration of the judge in the discharge of his separate functions, and not within the conformity act, section 914, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 684. Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286.

#### *Submitting Special Issues.*

The court is not bound by State laws in requiring a special verdict on any issue. United States Mut. Acci. Asso. v. Barry, 131 U. S. 120, 33 L. ed. 66, 9 Sup. Ct. Rep. 755; Dwyer v. St. Louis & S. F. R. Co. 52 Fed. 89, and cases cited; *Aetna L. Ins. Co. v. Vandecar*, 30 C. C. A. 48, 57 U. S. App. 446, 86 Fed. 290.

*Misconduct of Jury.*

See *Ruckle v. American Car & Foundry Co.* 194 Fed. 460, as to how the misconduct of a jury may be shown.

*Waiver of Jury.*

By section 649, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 525, it is provided that issues of fact in civil cases in any circuit court may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record shall file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, either general or special, shall have the same effect as the verdict of a jury. *Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307. We see, then, the jury must be waived by the consent of both parties in writing and filed as a part of the record. *Columbus Compress Co. v. United States Fidelity & G. Co.* 108 C. C. A. 465, 186 Fed. 488, and cases cited; *Elkin v. Denver Engineering Works Co.* 105 C. C. A. 1, 181 Fed. 685. However, though the trial be by the judge and no written waiver of the jury in the record, yet the appellate court will consider the case if the facts upon which the trial was had appeared in the record as an agreed statement. *Talcott v. Friend*, — L.R.A. (N.S.) —, 103 C. C. A. 80, 179 Fed. 676.

Again, a written waiver is not necessary to assess damages on a bond after default, under U. S. Rev. Stat. sec. 961, U. S. Comp. Stat. 1901, p. 699, providing that a jury must be called if either party asks it in such cases. *Brock v. Fuller Lumber Co.* 82 C. C. A. 402, 153 Fed. 273; *Aurora v. West*, 7 Wall. 82, 19 L. ed. 42.

Again In *Kearney v. Case*, 12 Wall. 275, 20 L. ed. 395, it is said the parties may waive a jury without filing written consent, and a trial of the case may be had and a valid judgment obtained, but no error made by the trial judge will be considered by the appellate court. *Elkin v. Denver Engineering Works Co.* 105 C. C. A. 1, 181 Fed. 685; *Erkel v. United States*, 95 C. C. A. 151, 169 Fed. 623. So, an agreement in open court to refer to a referee the facts and to make a finding is a waiver of

the right of jury trial. *United States v. Ramsey*, 158 Fed. 488. By section 566, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 461, the trial of issues of fact in the district court must be by jury in all causes within its jurisdiction, except equity and admiralty, and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy. Under this act it has been uniformly held that the district judge could not try an issue of fact in this court. *United States v. Louisville & N. R. Co.* 93 C. C. A. 58, 167 Fed. 306, *id.* 94 C. C. A. 441, 169 Fed. 73; *Low v. United States*, 94 C. C. A. 1, 169 Fed. 86; *Rogers v. United States*, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91; *United States v. Cleage*, 88 C. C. A. 249, 161 Fed. 85. It has been further held that a jury could only be waived in the circuit courts of the United States under section 649, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 525; but since circuit courts have been abolished under the New Code, which went into effect January 1, 1912, and the powers and duties of these courts have been transferred to the district courts, section 648 and 649, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 525, apply to district courts (New Judicial Code, sec. 291) in all cases within the former jurisdiction of the circuit courts now transferred to the jurisdiction of the district courts.

Section 566, U. S. Rev. Stat. was not repealed by the New Code, and would still apply to all cases of which the district courts had original jurisdiction prior to the New Code going into effect. These cases must still be tried by jury,—as, for instance, cases arising under the criminal jurisdiction of the Federal courts. See *Low v. United States*, 94 C. C. A. 1, 169 Fed. 86.

As to provisions for finding facts by jury in admiralty, see U. S. Comp. Stat. 1901, pp. 525, 526.

As to trials of fact in bankruptcy (30 Stat. at L. 551, chap. 541, sec. 19, U. S. Comp. Stat. 1901, p. 3429), see *Duncan v. Landis*, 45 C. C. A. 666, 106 Fed. 842.

## CHAPTER XI.

### TRIAL BY A JUDGE.

We have seen by section 649, U. S. Comp. Stat. 1901, p. 525, a jury may be waived and a trial had before the judge of the issues of fact and law. By section 700, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 570, it is provided that when an issue of fact is tried and determined by the court without the intervention of a jury, the rulings of the court in the progress of the trial, if duly excepted to at the time and duly presented by a bill of exceptions, and the conclusions of the court may be reviewed by the appellate court on error or appeal; and when the finding is special the review may extend to the sufficiency of the facts found to support the verdict. By section 649, U. S. Rev. Stat. the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. Having thus grouped the statutes of the United States permitting facts in an action at law to be tried by a judge, State statutes authorizing the waiving of a jury and a trial by the judge do not apply to Federal courts. *Erkel v. United States*, 95 C. C. A. 151, 169 Fed. 623.

When the trial is before the judge, requests to find on questions of law as well as fact may be made, where a review of the law is desired. *Paul v. Delaware, L. & W. R. Co.* 130 Fed. 951; *Norris v. Jackson*, 9 Wall. 125, 19 L. ed. 608; *Union County Nat. Bank v. Ozan Lumber Co.* 103 C. C. A. 584, 179 Fed. 710-712, and cases cited. See *Joline v. Metropolitan Securities Co.* 164 Fed. 650. Otherwise the separate conclusions of law in a trial before the jury are not contemplated by U. S. Rev. Stat. sections 649 and 700. *Fowler v. Going*, 91 C. C. A. 569, 165 Fed. 892.

Objections to the admission or exclusion of evidence, or to the court's ruling on propositions of law, must appear by bill of exceptions as required. Section 700, U. S. Rev. Stat. *Paul v. Delaware, L. & W. R. Co.* 130 Fed. 951-956; *Oxford & Coast Line R. Co. v. Union Bank*, 82 C. C. A. 609, 153 Fed. 724.

*Extent of Review in Cases Tried Before the Judge.*

By U. S. Rev. Stat. sections 649 and 700, U. S. Comp. Stat. 1901, pp. 525-570, where the cause is tried without a jury there is no right of review by an appellate court, when findings of fact are not made, except as to rulings of the court during the trial, excepted to at the time and duly presented by a bill of exceptions; the statement of the court in its opinion, as to the effect of the evidence, does not fall within "rulings" as contained in the statute. *Mason v. Smith*, 112 C. C. A. 146, 191 Fed. 502; *Keely v. Ophir Hill Consol. Min. Co.* 95 C. C. A. 96, 169 Fed. 598; *Streeter v. Sanitary Dist.* 66 C. C. A. 190, 133 Fed. 127; *Bell v. Union P. R. Co.* 194 Fed. 366; *Steinhauser v. Order of St. Benedict*, 194 Fed. 289. But the findings of fact may be either general or special (U. S. Rev. Stat. section 649); and when special the review may extend to the sufficiency of the facts found to support the judgment (U. S. Rev. Stat. sec. 700) *Streeter v. Sanitary Dist.* 66 C. C. A. 190, 133 Fed. 127.

In Chicago, R. I. & P. R. Co. v. *Barrett*, 111 C. C. A. 158, 190 Fed. 118, it said that where the finding is special, no exception is necessary, to raise the issue as to the sufficiency of the evidence to support the judgment. *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 432, 187 Fed. 104, 105, and cases cited; *St. Louis v. Wiggins Ferry Co.* 11 Wall. 428, 20 L. ed. 192; *Webb v. National Bank*, 77 C. C. A. 143, 146 Fed. 719, and cases cited. And also as to the sufficiency of the evidence to support the special finding, if exception is taken as required by section 700, U. S. Rev. Stat. *Mason v. Smith*, 112 C. C. A. 146, 191 Fed. 503, and numerous authorities cited.

When the finding of fact is general for plaintiff or defendant the review can only extend to rulings of the court in the progress of the trial, and then only "when excepted to at the time and duly presented by a bill of exceptions." U. S. Rev. Stat. sec. 700, U. S. Comp. Stat. 1901, p. 570. *Keely v. Ophir Hill Consol. Min. Co.* 95 C. C. A. 96, 169 Fed. 598; *Marinette Saw-mill Co. v. Scofield*, 98 C. C. A. 344, 174 Fed. 562; *Webb v. National Bank*, 77 C. C. A. 143, 146 Fed. 718; *Streeter v. Sanitary Dist.* 66 C. C. A. 190, 133 Fed. 124; Otherwise they are not reviewable. *Allen v. Knott*, 96 C. C. A. 180, 171 Fed. 77;

Chicago, B. & Q. R. Co. v. Frye-Bruhn Co. 106 C. C. A. 217, 184 Fed. 15; Cooper v. Omohundro, 19 Wall. 65, 22 L. ed. 47; Grattan Twp. v. Chilton, 38 C. C. A. 84, 97 Fed. 145; York v. Washburn, 64 C. C. A. 132, 129 Fed. 564; Ogden City v. Weaver, 47 C. C. A. 485, 108 Fed. 564; Marinette Sawmill Co. v. Scofield, 98 C. C. A. 344, 174 Fed. 562; McMaster v. New York L. Ins. Co. 40 C. C. A. 119, 99 Fed. 856; United States Fidelity & G. Co. v. Woodson County, 76 C. C. A. 114, 145 Fed. 144. The assignment that there is no evidence to support the judgment is a question of law which cannot be reviewed unless presented to and passed on by the trial court by some appropriate action during the trial, unless the finding is entirely without any evidence to support it. Steinhauser v. Order of St. Benedict, 194 Fed. 289.

An exception to the "entry of the judgment" does not present the question, that there was no evidence to support the judgment. Keely v. Ophir Hill Consol. Min. Co. 95 C. C. A. 96, 169 Fed. 598. Whether on all the proof the judgment can be sustained is an issue that must be raised by some motion, and if the ruling is adverse, exception must be taken to the ruling (*Id.* 600); as, thus in United States Fidelity & G. Co. v. Woodson County, 76 C. C. A. 114, 145 Fed. 144-151, it is said: "The question of whether or not at the close of the trial there is substantial evidence to sustain a finding in favor of a party is a question of law which arises in the trial. In the trial by a jury it is raised by a request for a peremptory instruction, and in a trial by the judge it is raised on a motion for a judgment, or a request for a declaration of the law, or any other action which fairly presents this issue of law for the court to determine before the trial ends." Sun Pub. Co. v. Lake Erie Asphalt Block Co. 84 C. C. A. 584, 157 Fed. 80; Paul v. Delaware, L. & W. R. Co. 130 Fed. 954. And where defendant at the end of plaintiff's case makes a motion for judgment, he waives his exception to the ruling of the court by introducing evidence. Allen v. Knott, 96 C. C. A. 180, 171 Fed. 76; Barnard v. Randle, 49 C. C. A. 177, 110 Fed. 906.

We have, then, the rule that if the verdict is general, only such rulings of the court in the progress of the trial can be reviewed as are presented by bill of exceptions, or the sufficiency

of the pleadings to support the judgment. Paul v. Delaware, L. & W. R. Co. 130 Fed. 953. If a review of the law is desired, one must get the court to find a special verdict which raises the legal proposition, or present their propositions of law and ask the court to rule on them. Ibid.; Norris v. Jackson, 9 Wall. 125, 19 L. ed. 608; Mankato v. Barber Asphalt Paving Co. 73 C. C. A. 439, 142 Fed. 329; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485.

*Effect of Findings of Fact by the Judge.*

The finding of facts by a judge is equivalent to the verdict of a jury, whether the finding is special or general. U. S. Rev. Stat. sec. 649, 700, 1011; U. S. Comp. Stat. 1901, pp. 525, 570, 715; W. L. Perkins & Co. v. Von Baumbach, 107 C. C. A. 371, 185 Fed. 265; Erkel v. United States, 95 C. C. A. 151, 169 Fed. 623; Chicago, G. W. R. Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 100 C. C. A. 41, 176 Fed. 242, 20 Ann. Cas. 1200; Searcy County v. Thompson, 13 C. C. A. 357, 27 U. S. App. 715, 66 Fed. 101; Paul v. Delaware, L. & W. R. Co. 130 Fed. 956, and cases cited; Streeter v. Sanitary Dist. 66 C. C. A. 190, 133 Fed. 126; Davis v. McEwen Bros. 193 Fed. 311. And, as we have seen, it is reviewable to the same extent and by the same procedure as a trial and verdict by a jury, except that when the finding is special the question whether or not the facts found sustain the judgment is open to review. United States Fidelity & G. Co. v. Woodson County, 76 C. C. A. 114, 145 Fed. 144-151; Hall v. Western U. Teleg. Co. 89 C. C. A. 449, 162 Fed. 657; Hill v. Walker, 92 C. C. A. 633, 167 Fed. 241; Erkel v. United States, 95 C. C. A. 151, 169 Fed. 623; Lehnens v. Dickson, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 491; Paul v. Delaware, L. & W. R. Co. 130 Fed. 956, and cases cited. And where the findings are special, no exception is necessary to review, as before stated (see Extent of Review When Judge Tries Case); and when general it cannot be reversed for any error of fact. Ibid.; sec. 1011, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 715; Chicago G. W. R. Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 100 C. C. A. 41, 176 Fed. 242, 20 Ann. Cas. 1200; Schmid v. Dohan, 93 C. C. A. 194, 167 Fed. 804; Union County

Nat. Bank v. Ozan Lumber Co. 103 C. C. A. 584, 179 Fed. 710; Marinette Sawmill Co. Scofield, 98 C. C. A. 344, 174 Fed. 562; Paul v. Delaware, L. & W. R. Co. 130 Fed. 951; Dirst v. Morris, 14 Wall. 490, 20 L. ed. 723. The complaining party is without redress except for the wrongful admission of evidence presented by a bill of exceptions. National Surety Co. v. Cincinnati, N. O. & T. P. R. Co. 76 C. C. A. 19, 145 Fed. 35. So then, if there be no special finding, and the ultimate facts are not agreed upon, there can be no review, under the general verdict, of the question whether the judgment is supported by the facts found. National Surety Co. v. Cincinnati, N. O. & T. P. R. Co. 76 C. C. A. 19, 145 Fed. 35, and cases cited. Again, where there is a special finding it is conclusive if there be any substantial evidence to support it, so it is not reviewable on the ground that the finding is not supported by the evidence (Hughes County v. Livingston, 43 C. C. A. 541, 104 Fed. 306), but only on the ground that the finding is not sufficient to support the judgment, or that the admission or exclusion of evidence was erroneous, upon which the finding was made, properly presented by bill of exceptions (Barnsdall v. Waltemeyer, 73 C. C. A. 515, 142 Fed. 415), or whether or not there was any substantial evidence to support the special finding (Id. 417, and cases cited; National Surety Co. v. Cincinnati, N. O. & T. P. R. Co. 76 C. C. A. 19, 145 Fed. 34).

Again, the court cannot be required to pass on propositions of law submitted by counsel during the trial, as if the trial was before a jury, and assignments of error based thereon are not reviewable as in State practice. Streeter v. Sanitary Dist. 66 C. C. A. 190, 133 Fed. 124.

#### *Disqualification of Judge.*

As to how a judge may be disqualified on the ground of prejudice is thoroughly discussed in *Ex parte N. K. Fairbanks Co.* 194 Fed. 978, with much citation of authority.

#### *Trial by Auditor.*

We have seen by sections 648 and 649, U. S. Rev. Stat. U. S.

Comp. Stat., 1901, p. 525, that the Federal statutes provide only for a trial by jury or by the judge in common-law cases (*Swift & Co. v. Jones*, 76 C. C. A. 253, 145 Fed. 492), but upon consent of the parties the Federal courts have frequently referred to an auditor or referee the ascertainment of questions of fact, and, when stipulated in the consent, questions of law also. In *Swift v. Jones*, supra, it was held that the trial judge has no power, even with the consent of parties, to depart from the express provisions of the Federal statutes as to trial in common-law cases as stated in sections 648-700, U. S. Rev. Stat.

There is no question that right of trial by jury, or by the judge alone, being a constitutional and statutory right, cannot be departed from unless by the consent of all parties, but the practice to refer the facts of a case or the facts and law to an auditor by stipulation of the parties has been so generally permitted by the Federal courts that it may be said to be a fixed rule of Federal practice. So where by consent reference to an auditor is agreed to, a jury trial is waived (*United States v. Ramsey*, 158 Fed. 488; *Newcomb v. Wood*, 97 U. S. 581, 24 L. ed. 1085), but not otherwise (*Suyzer v. Watson*, 39 Fed. 414).

#### *Following State Statutes.*

Numerous cases have held that where a reference has been made by consent of parties, that it had reference to the State laws in such cases made and provided. *United States v. Ramsey*, 158 Fed. 496, and cases cited; *Parker v. Ogdensburg & L. C. R. Co.* 25 C. C. A. 205, 51 U. S. App. 88, 79 Fed. 817. And such will be the recognized rule of procedure when it will not encumber the administration of the law, or tend to defeat justice in the particular case. *Parker v. Ogdensburg & L. C. R. Co.* supra, p. 819, and cases cited; *Boatmen's Bank v. Trower Bros. Co.* 104 C. C. A. 314, 181 Fed. 808.

#### *When Reference Can be Made without Consent.*

It has been held that it is an inherent power in a trial judge in cases at law to refer to an auditor any case to state an account, when the accounts are complicated, and with the view of using

the stated account in the jury trial. This is held not a deprivation of a trial by jury, but the most appropriate method for aiding the jury by simplifying the issues. Craven v. Clark, 186 Fed. 959; Fenno v. Primrose, 56 C. C. A. 313, 119 Fed. 801; Brock v. Fuller Lumber Co. 82 C. C. A. 402, 153 Fed. 272; St. Anthony v. Houlihan, 106 C. C. A. 394, 184 Fed. 252-254; Earle v. Myers, 207 U. S. 248, 249, 52 L. ed. 194, 195, 28 Sup. Ct. Rep. 86; Wilson v. American Circular Loom Co. 109 C. C. A. 600, 187 Fed. 840. In Brock v. Fuller Lumber Co. 82 C. C. A. 402, 153 Fed. 273, damages on a bond may be referred to an auditor without consent, where default is taken.

*Effect of Auditor's Findings.*

As to the facts, it will be treated as the findings of a jury, and will not be interfered with unless there is no substantial evidence to support them. Boatmen's Bank v. Trower Bros. Co. 104 C. C. A. 314, 181 Fed. 806-809, and authorities cited; Roberts v. Benjamin, 124 U. S. 71, 31 L. ed. 336, 8 Sup. Ct. Rep. 393; United States v. Ramsey, 158 Fed. 498. In the latter case it is said that where it appears that the auditor or referee has exercised his honest judgment after a full hearing, the court cannot decline to accept the findings on the ground that the auditor has erred. Id. 488. So, where the auditor has returned his findings of fact and law under the order of reference, the court cannot set aside the findings, find new facts, and enter judgment thereon; but he may refuse to confirm the report, and the case will then stand open for jury trial. Elkin v. Denver Engineering Works Co. 105 C. C. A. 1, 181 Fed. 686, and cases cited; Boatmen's Bank v. Trower Bros. Co. 104 C. C. A. 314, 181 Fed. 809, 810; Kilduff v. John A. Roebling's Sons Co. 150 Fed. 240.

## CHAPTER XII.

### WITNESSES.

#### *Competency.*

By section 858, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 659, it was provided that in the courts of the United States no witness should be excluded on account of color, or because he was a party to or interested in the issue in any civil case; provided that in actions by or against executors, administrators, and guardians neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify by the court or the opposite party. This act was amended in 1906 as follows: The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or territory in which the court is held; which in effect has repealed section 858 as to the competency of witnesses in the Federal courts. Prior to this act State decisions were not controlling. *Travis v. Nederland L. Ins. Co.* 43 C. C. A. 653, 104 Fed. 486; *Harris v. Brown*, 109 C. C. A. 60, 187 Fed. 7; *Downs v. Wall*, 100 C. C. A. 209, 176 Fed. 659; *Rowland v. Biesecker*, 181 Fed. 128.

Objection to competency must be made before examination if known, or, if not known, as soon as discovered. *Benson v. United States*, 146 U. S. 332, 36 L. ed. 994, 13 Sup. Ct. Rep. 60.

#### *Mode of Proof in Common-Law Actions.*

The proof in common-law actions shall be by oral testimony, and the examination of the witness in open court, except as hereinafter set forth, when the witness may be examined by issuing depositions. U. S. Rev. Stat. sec. 861, U. S. Comp. Stat. 1901, p. 661; *Compania Azucarera Cubana v. Ingraham*, 180 Fed. 516, 517. The witness must appear in open court,

unless a condition arises permitting the testimony to be taken by depositions. *Id.* 517.

(See Deposition on Law Side.)

### *Presumptions and Burden of Proof.*

The Federal courts exercise their own judgments in determining presumptions and burden of proof. *Young v. Lowry*, 192 Fed. 825.

### *Credibility of Witness.*

The credibility of the witness is entirely for the jury to determine, and the court should never direct a verdict against substantial evidence on the ground that the witness was not worthy of belief. *Rochford v. Pennsylvania Co.* 98 C. C. A. 105, 174 Fed. 83, 84; *Waters v. Davis*, 76 C. C. A. 444, 145 Fed. 912, 914, and cases cited, *Erie R. Co. v. Rooney*, 108 C. C. A. 118, 186 Fed. 19; *Byers v. Carnegie Steel Co.* 16 L.R.A.(N.S.) 214, 86 C. C. A. 347, 159 Fed. 347.

### *Subpœnas for Witnesses in Civil Cases.*

Subpœnas in civil cases may run into any other district than that in which the court is held: Provided, the witness does not live at a greater distance than 100 miles from the place where the court is held. U. S. Rev. Stat. Sec. 876, U. S. Comp. Stat. 1901, p. 667; *Meyer v. Consolidated Ice Co.* 163 Fed. 400; *Smith v. Chicago & N. W. R. Co.* 38 Fed. 322. (See Process as to service.) See Rev. Stat. Sec. 877, U. S. Comp. Stat. 1901, p. 667. If living more than 100 miles from the place of trial, his deposition must be taken. *Re Hemstreet*, 117 Fed. 569; *Smith v. Chicago & N. W. R. Co.* supra.

(See Depositions *De Bene Esse.*)

### *Witness Must Appear.*

Neither the immateriality of the evidence nor insufficiency of the pleading to raise an issue will justify disobedience. Fair-S. S. at L.—6.

field v. United States, 76 C. C. A. 590, 146 Fed. 508, 509, and cited. As to power to punish for disobedience, see New Judicial Code, sec. 268, embodying the provisions of sec. 725, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 583, which is repealed. But his fees must have been tendered. *Re Boeshore*, 125 Fed. 652.

*Witness Must Answer.*

The true remedy for the refusal of a witness to answer proper questions or produce relevant evidence is an order of the court that he shall do so and declare him in contempt, assessing the penalties permitted. New Code, sec. 268. See Rev. Stat. sec. 4908, U. S. Comp. Stat. 1901, p. 3390. *Brungger v. Smith*, 49 Fed. 124.

*Production of Books, Papers, etc., by Order at Trial.*

By sec. 724, U. S. Rev. Stat., which has not been repealed by the New Code, it is provided: In the trials of actions at law the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. U. S. Comp. Stat. 1901, p. 583. See *Simkins, Federal Equity Suit*, 2d ed. pp. 551, 552.

If the plaintiff fails to comply with such order, the court may on motion give the like judgment for the defendant, where the plaintiff disobeys, as in cases of nonsuit, and if the defendant fails to comply with the order the court may on motion give judgment against him by default. *Rosenberger v. Shubert*, 182 Fed. 411; *Newgold v. American Electric Novelty & Mfg. Co.* 108 Fed. 342; *Gray v. Schneider*, 119 Fed. 474; *Carpenter v. Winn*, 91 C. C. A. 301, 165 Fed. 636; *Pennsylvania R. Co. v. International Coal Min. Co.* 84 C. C. A. 421, 156 Fed. 765.

It was held in *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.* 98 Fed. 175; *Gregory v. Chicago, M. & St. P. R. Co.* 3 McCrary, 374, 10 Fed. 529; *Tucker v. Phoenix Assur. Co.* 67 Fed. 18; *Exchange Nat. Bank v. Washita Cattle Co.* 61 Fed. 190, that the section applied not only to the production of books,

etc., at the trial, but that under the act the order could force an inspection, before the trial, by the adverse party. See also Paine v. Warren, 33 Fed. 357, requiring that issue should have been joined before the motion, but in Kaiser v. Chicago, St. P. M. & O. R. Co. 192 Fed. 1013, following Carpenter v. Winn, 221 U. S. 533, 55 L. ed. 842, 31 Sup. Ct. Rep. 683, it was held that a judge of the district court could not order an inspection of the books and papers before the trial of the cause at law. See also Cassatt v. Mitchell Coal & Coke Co. 10 L.R.A.(N.S.) 99, 81 C. C. A. 80, 150 Fed. 32, holding that such an order could only be obtained by a bill of discovery in equity.

*Subpœna Duces Tecum.*

The trial court has unquestionably the power to compel through a subpœna duces tecum the production, by any witness in the case, of documentary evidence in his power or possession, if competent and material as evidence in the cause. American Lithographic Co. v. Werckmeister, 91 C. C. A. 376, 165 Fed. 426. It is said in this case that section 724 is not the only means provided for bringing a party's books and papers into court in a trial of an action at law. The power to issue the subpœna is elementary.

U. S. Rev. Stat. sec. 869, U. S. Comp. Stat. 1901, p. 665, although applicable as stated, to depositions taken under a *deditus potestatem*, provides for the issue of this subpœna upon the application of either party to the suit. It shall issue upon the judge being satisfied by the affidavit of the person applying or otherwise, that there is a reason to believe that the documentary evidence applied for is in the possession or power of the witness to be subpœnaed, and that the same if produced would be competent and material evidence for the party applying. Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Dancel v. Goodyear Shoe Machinery Co. 128 Fed. 753. This statute states the procedure in applying for the subpœna, and what it shall contain; and upon the failure of the witness so subpœnaed to produce the books or documents called for in the subpœna, it being in his possession or power, the judge may proceed to enforce obedience to said process, or punish the dis-

obedience in like manner as any court of the United States may do for disobedience to its process. When any such paper, writing, or document called for is produced, the party requiring it may make a correct copy of the same, or so much thereof as he shall require. The witness is not compelled to surrender original documents; the adverse party is only entitled to copies. *Smith v. National Bank*, 193 Fed. 255.

*Must Describe the Documentary Evidence Desired.*

The paper writings, books, or other document required must be sufficiently described and definite, that they may be produced without uncertainty. U. S. Rev. Stat. Sec. 869, above referred to; *United States v. Terminal R. Asso.* 148 Fed. 486; *id.* 154 Fed. 268; *Santa Fe P. R. Co. v. Davidson*, 149 Fed. 603.

*Must Appear Material and in the Possession or Power of the Witness.*

The court must be satisfied by the affidavit of the person applying or otherwise, that there is reason to believe that the documentary evidence required as shown by the description is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, before issuing the order to the clerk to issue the subpoena. *United States v. Collins*, 145 Fed. 710; *United States v. Terminal R. Asso.* 154 Fed. 268; *United States v. American Tobacco Co.* 146 Fed. 557, 558.

See *Simkins, Federal Equity Suit*, pp. 551, 552.

It is for the court to determine whether the application for a subpoena duces tecum establishes a reasonable ground to believe that the documentary evidence would be material (*United States v. Terminal R. Asso.* 148 Fed. 486, *Id.* 154 Fed. 268); and the application should show the facts from which the court may determine the materiality and relevancy (*Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; *Bischoffsheim v. Brown*, 29 Fed. 341; *Dancel v. Goodyear Shoe Machinery Co.* 128 Fed. 753).

*Issuing to Corporations.*

In *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, a distinction between issuing a subpœna duces tecum to a corporation, and to the individual is clearly made in the right of refusal to produce books and other documentary evidence when called upon to do so by subpœna in cases of suit by the government. It is held that the difference exists in the reserved right of the State to investigate as to whether the corporation has exceeded its powers. *United States v. American Tobacco Co.* 146 Fed. 557; *Sante Fe P. R. Co. v. Davidson*, 149 Fed. 604; *Re Bornn Hat Co.* 184 Fed. 506. Under the 5th Amendment to the Federal Constitution a corporation is not a person. *Id.*

*Refusal of Witness to Produce.*

Where the documentary evidence is in the possession or power of the witness to produce it, and is described with sufficient certainty, the witness must produce it at the time and place required by the subpœna. Upon his refusal to do so, the court may proceed to enforce obedience, or punish disobedience by contempt proceedings. U. S. Rev. Stat. §§ 725, 869, U. S. Comp. Stat. 1901, pp. 583, 665; New Judicial Code, sec. 268; *United States v. Tom Wah*, 160 Fed. 207. The witness cannot excuse disobedience on the ground that the evidence called for is immaterial, irrelevant, or incompetent under the issues in the case, for, as seen, the court determines that before issuing the subpœna. *United States v. Terminal R. Asso.* 148 Fed. 486. Where the objection is made on the ground of incrimination of the witness, his mere statement that such would be the effect is no excuse; before he can claim this privilege he must first be sworn as a witness; that is, he must obey the subpœna. *United State v. Kimball*, 117 Fed. 156; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *Newgold v. American Electrical Novelty & Mfg. Co.* 108 Fed. 343. And when called upon to disclose the incriminating matter, then he may claim his constitutional protection from incriminating himself. *United States v. Collins*, 145 Fed. 711.

A partner cannot claim that the books of a partnership are not in his individual possession or power, but in the possession of the firm, when subpoenaed to bring the books into court. *United States v. Collins*, 145 Fed. 710.

### *Examination of Witnesses.*

As has already been stated, the examination of the witness must be in open court and oral, unless depositions are authorized as hereinafter stated. The ordinary rules of the common law as applied to evidence govern examination of witnesses in law cases.

Any objection to evidence because irrelevant or otherwise open to objection, which has been admitted without objection, on motion to strike out, will be denied. *Farmers' & T. Nat. Bank v. Greene*, 20 C. C. A. 500, 43 U. S. App. 446, 74 Fed. 441, and cases cited. The same rule applies to documents and papers.

Where evidence is admitted upon the promise of counsel to connect it so as to show materiality, objection must be made as soon as it appears that the party has failed to connect it with any material issue. *Central Vermont R. Co. v. Soper*, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 889.

### *Cross-Examination.*

Cross-examination must be confined to the subjects of the direct examination. If the cross-examiner desires to examine on other matters not brought out in the direct examination, he must make the witness his own at the proper time in presenting his own case (*Æolian Co. v. Standard Music Roll Co.* 176 Fed. 811), for then he must stand sponsor for his credibility, and be bound by what he may say on the new matter, either in direct or cross examination. *Ferry-Hallock Co. v. Orange Hat Box Co.* 185 Fed. 817.

It is in the discretion of a trial judge to limit the cross-examination of a witness, and it is not reviewable unless the discretion has been abused. *Baltimore & O. R. Co. v. Thornton*, 110 C. C. A. 502, 188 Fed. 878.

*Examining Opposing Party Before Trial.*

Many of the statutes of the States provide for examination of the opposing party before trial, but neither the Federal practice nor statutes permit it. (See Simkins, *Federal Equity Suit*, 2d ed. p. 530.) Hanks Dental Asso. v. International Tooth Crown Co. 194 U. S. 303, 48 L. ed. 989, 24 Sup. Rep. 700; Frost v. Barber, 173 Fed. 847.

Federal courts do not allow, in advance of the trial, depositions intended to fish for information, or forcing a party to disclose his case by pumping him or his witnesses before the trial. See Simpkins, *Federal Equity Suit*, 2d ed. p. 531, for cases pro and con.

So, a court cannot order the examination of a party in suit for personal injuries, by a surgeon, in advance of the trial. Union P. R. Co. v. Botsford, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000, and it is not controlled by State Laws. Id. 256; Hanks Dental Asso. v. International Tooth Crown Co. 194 U. S. 304, 48 L. ed. 989, 24 Sup. Ct. Rep. 700.

*Can the Testimony of a Deceased Witness in a Former Trial be Admitted.*

There has been some conflict of opinion as to the admissibility of evidence of a witness taken orally in a former trial, after his decease, in a subsequent trial.

It is contended that section 861 of U. S. Rev. Stat., requiring the witness to be examined in open court orally, in cases tried at law, has no exceptions, except those stated in subsequent sections (U. S. Rev. Stat. 863-867, U. S. Comp. Stat. 1901, pp. 661-664), and no state statute can govern. *Ex parte Fiske*, 113 U. S. 724, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; *Diamond Coal & Coke Co. v. Allen*, 71 C. C. A. 107, 137 Fed. 705; *Salt Lake City v. Smith*, 43 C. C. A. 637, 104 Fed. 457-469; Hanks Dental Asso. v. International Tooth Crown Co. 194 U. S. 307, 48 L. ed. 990, 24 Sup. Ct. Rep. 700.

It is further contended that the principles of evidence recognized by the common law are only administered in the Federal courts when Congress has not legislated upon the subject, and

Congress having by section 861 fixed the method by which testimony must be received in trials by action at law, that the testimony cannot be received otherwise. On the other hand, just the opposite view has been taken, that section 861, U. S. Rev. Stat., does not pretend to provide for the emergency of the death of the witness after he has testified orally in open court, and the common-law rules of evidence would apply, and consequently it is held that where the witness has testified orally in a former trial of a case, and dies, his testimony is admissible in a subsequent trial of the case. Chicago, St. P. M. & O. R. Co. v. Myers, 25 C. C. A. 486, 49 U. S. App. 279, 80 Fed. 361, 365; Toledo Traction Co. v. Cameron, 69 C. C. A. 28, 137 Fed. 62; Nome Beach Lighterage & Transp. Co. v. Standard M. Ins. Co. 156 Fed. 485, see same case—92 C. C. A. 571, 167 Fed. 120.

The better opinion admits the testimony of a deceased witness in a subsequent trial of the case in which he formerly testified, where he has been fully examined and cross-examined in the former trial, and correct stenographic notes have been taken; there can be no question that his testimony thus taken would be equivalent to a deposition taken under the forms of law, which would be certainly admissible after the death of the witness; and especially should the evidence be admissible if permitted by the laws of the State in which the trial takes place (authorities above). Chicago, St. P. M. & O. R. Co. v. Myers, 25 C. C. A. 486, 49 U. S. App. 279, 80 Fed. 361; Mattox v. United States, 156 U. S. 237-241, 39 L. ed. 409, 410, 15 Sup. Ct. Rep. 337; Ruch v. Rock Island, 97 U. S. 693, 24 L. ed. 1101.

Some courts hold that if the witness is dead "*or from any other cause*" it is impossible to obtain his oral examination, his testimony given in a former trial is admissible (Chicago, St. P. M. & O. R. Co. v. Myers, 25 C. C. A. 486, 49 U. S. App. 279, 80 Fed. 361-365), but this could not possibly apply to the mere absence of the witness at the trial, though counsel relied on his promise to be present before going into trial (Chicago, M. & St. P. R. Co. v. Newsome, 98 C. C. A. 1, 174 Fed. 394).

#### *Effect of Withdrawing Evidence Erroneously Admitted.*

The general rule is, that the withdrawal of evidence errone-

eously admitted to the jury is to correct the error, when withdrawn before the trial closes. *Armour & Co. v. Kollmeyer*, 16 L.R.A.(N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78; *Turner v. American Security & T. Co.* 213 U. S. 267, 53 L. ed. 792, 29 Sup. Ct. Rep. 420, and cases cited; *Throckmorton v. Holt*, 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. Rep. 474; *Ware v. Persons*, 98 C. C. A. 364, 173 Fed. 879. The exception to the rule has been stated as follows: Where the evidence so admitted has been so impressive that in the opinion of the Appellate court its effect was not removed from the minds of the jury by its withdrawal, a new trial should be granted. *Armour & Co. v. Kollmeyer*, 16 L.R.A.(N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78; and cases cited above; *Waldron v. Waldron*, 156 U. S. 361, 381-383, 39 L. ed. 453, 458, 459, 15 Sup. Ct. Rep. 383.

Again, evidence erroneously admitted is not prejudicial where it is in line with other evidence which is competent and sufficient. *Smith v. Au Gres Twp.* 9 L.R.A.(N.S.) 876, 80 C. C. A. 145, 150 Fed. 258; *Crichfield v. Julia*, 77 C. C. A. 297, 147 Fed. 65.

*Exceptions to Evidence.*

See Bill of Exceptions.

## CHAPTER XIII.

### DEPOSITIONS ON THE LAW SIDE DE BENE ESSE.

We have seen that the mode of proof on the law side must be by oral examination in open court, except under conditions when depositions are permitted. U. S. Rev. Stat. sec. 861, U. S. Comp. Stat. 1901, p. 661. By section 863 depositions *de bene esse* may issue in trials on the law side when the witness lives at a greater distance from the place of trial than 100 miles, or is bound on a sea voyage, or is about to go out of the United States, or out of the district in which the case is to be tried, and a greater distance than 100 miles from the place of trial, before the time of trial; or when he is ancient and infirm. If one of these conditions do not exist, the witness cannot be examined in advance of the trial. Simkins, Federal Equity Suit, 2d ed. p. 530; Blood v. Morrin, 140 Fed. 918; Shellabarger v. Oliver, 64 Fed. 306; Frost v. Barber, 173 Fed. 848; Bird v. Halsy, 87 Fed. 676, 677; Lowrey v. Kusworn, 66 Fed. 539; Zych v. American Car & Foundry Co. 127 Fed. 724; Henning v. Boyle, 112 Fed. 397; Hartman v. Feenaughty, 139 Fed. 888; Importers' & T. Nat. Bank v. Lyons, 134 Fed. 510; Diamond Coal & Coke Co. v. Allen, 71 C. C. A. 107, 137 Fed. 705, 706; National Cash-Register Co. v. Leland, 77 Fed. 242.

#### *When Section 863 Does Not Apply.*

It seems the rule does not apply when depositions are taken in answer to a rule to show cause, where the facts are disputed. Importers' & T. Nat. Bank v. Lyons, 134 Fed. 512. By section 866, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 663, it is provided for taking depositions under a *deditus potestatem* and *in perpetuam*, in any case where it is necessary in order to prevent a failure or delay of justice, and any of the courts of the United States may grant a *deditus* to take depositions according to "common usage;" and any circuit court may on application to it as a court of equity direct depositions *in perpetuam rei*

*memoriam*, if they relate to any matters that may be cognizable in any court of the United States; and in such cases the provisions of section 863 set forth above do not apply.

Depositions *de bene esse* do not apply to foreign witnesses. *Compania Azucarera Cubana v. Ingraham*, 180 Fed. 516; *The Alexandra*, 104 Fed. 907.

By section 867, U. S. Rev. Stat., any court of the United States may admit in its discretion any disposition taken *in perpetuam*, etc., which would be so admissible in a court of a State wherein such cause is pending, according to the laws thereof. *Ohio Coffee Co. v. Hutchings*, 96 C. C. A. 653, 172 Fed. 202. See Simkins, *Federal Equity Suit*, 2d ed. pp. 522, 523, for discussion of these sections—also *Id.* pp. 533, et seq. “Common usage” means written interrogatories, and since 1892 includes State methods. *Compania Azucarera Cubana v. Ingraham*, 180 Fed. 517.

#### *Effect of Taking De Bene Esse.*

*De bene esse* means provisionally, and when thus permitted, it is with the intent that the depositions are to be used, provided the witness cannot be put upon the stand at the trial. *Whitford v. Clark County*, 119 U. S. 524, 30 L. ed. 500, 7 Sup. Ct. Rep. 306; *Texas & P. R. Co. v. Watson*, 50 C. C. A. 230, 112 Fed. 402; *Texas & P. R. Co. v. Reagan*, 55 C. C. A. 427, 118 Fed. 815. By section 865 it is provided that unless the court is satisfied that when the deposition is offered, that the witness is dead, or gone out of the United States or to a greater distance than 100 miles from the place of trial, or by reason of age, sickness, or bodily infirmity the witness is unable to appear, the deposition cannot be read.

#### *Manner of Taking De Bene Esse.*

By U. S. Rev. Stat. sec. 864, it is provided that the witness being sworn to testify the whole truth, his testimony shall be reduced to writing or type written by the magistrate taking the deposition, or by some person under his personal supervision, or by himself in the magistrate's presence, and by no other per-

son, and after being reduced to writing shall be subscribed by the deponent. U. S. Comp. Stat. 1901, p. 663. The deposition can be taken at any place where the witness is found and served with the subpoena. Mutual Ben. L. Ins. Co. v. Robison, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 732, Blood v. Morrin, 140 Fed. 918; United States v. Standard Sanitary Mfg. Co. 187 Fed. 234. As to notice of taking and form, service of notice, taking by interrogatories or orally, see Simkins, Federal Equity Suit, 2d ed. pp. 523-529.

*Before Whom Taken.*

Section 863 provides that it may be taken before any judge of any court of the United States, or any commission of the (circuit) district court, or any clerk of the district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States or any notary public not being attorney or counsel to either of the parties nor interested in the event of the cause.

*Certificate of the Officer Taking.*

The certificate of the officer is indicated in sec. 865, U. S. Rev. Stat., but where the deposition is taken in a law case, the certificate must show the reason for taking the deposition at law; as, for instance, "he was about to leave the country" (Bird v. Halsy, 87 Fed. 677), otherwise the certificate as given in Simkins, Federal Equity Suit, 2d ed. p. 527, can be used.

*Return of the Deposition When Taken to the Court.*

Rev. Stat. sec. 865, U. S. Comp. Stat. 1901, p. 663, requires the deposition to be transmitted personally by the officer, and to be delivered with his own hand in the court for which it is taken, or it shall, together with a certificate of the reasons for taking it, and of the notice, if any, given to the adverse party, be by the officer taking sealed up and directed to such court, and remain under his seal until opened in court.

It seems from the statute that the certificate stating the reasons for taking will not be required when the officer delivers the deposition into court with his own hands. To prevent any appearance of tampering with the depositions the sealing and other requirements for mailing must be strictly pursued. (See Simkins, Federal Equity Suit, 2d ed. p. 559.)

*Manner of Taking Under a Deditus Potestatem.*

For procedure and forms, see Simkins, Federal Equity Suit, 2d ed. pp. 532-538; U. S. Rev. Stat. secs. 868-870, U. S. Comp. Stat. 1901, pp. 664, 665.

*Mode Prescribed by State Laws.*

By act of March 9, 1892, 27 Stat. at L. 7, chap. 14, U. S. Comp. Stat. 1901, p. 664, it is provided that depositions in suits at law may be taken in the mode prescribed by State laws in which the courts are held. See Simkins, Federal Equity Suit, 2d ed. pp. 530, 531. This section has been frequently construed, and certain rules may be evolved from the decisions as follows:

First. The State statutes do not affect the causes or ground for taking the depositions on the law side. United States v. Fifty Boxes & Packages of Lace, 92 Fed. 601. It simplifies the practice without enlarging the conditions. Hanks Dental Asso. v. International Tooth Crown Co. 194 U. S. 309, 48 L. ed. 991, 24 Sup. Ct. Rep. 700, and cases cited; Texas & P. R. Co. v. Wilder, 35 C. C. A. 105, 92 Fed. 957; National Cash-Register Co. v. Leland, 77 Fed. 242, same case 37 C. C. A. 372, 94 Fed. 502; Despeaux v. Pennsylvania R. Co. 81 Fed. 897.

Second. Depositions of a witness living within 100 miles of the place of trial cannot be read in evidence, and the distance is to be determined by taking the usual, ordinary, and shortest route of public travel (Jennings v. Menaugh, 118 Fed. 612, and authorities cited), unless the witness was aged and infirm or the other conditions provided in section 863, U. S. Rev. Stat., existed.

Third. That the act of 1892, providing for taking depositions under the State law, did not change this rule. *Shellabarger v. Oliver*, 64 Fed. 306; *Seeley v. Kansas City Star Co.* 71 Fed. 555; *National Cash-Register Co. v. Leland*, 77 Fed. 242.

Fourth. That where the depositions had been taken in a State court of a witness who lives within 100 miles of the place of trial, and the case afterwards removed to the Federal court, they cannot be read if the suit be at law unless they were taken under other conditions stated in section 863 (*Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 958; *Toledo Traction Co. v. Cameron*, 69 C. C. A. 28, 137 Fed. 59), and unless the witness was dead when offered. (*Ibid.*; *United States L. Ins. Co. v. Ross*, 42 C. C. A. 601, 102 Fed. 722). The phrase "must live a greater distance than 100 miles" means that when the depositions were taken, where the witness was at the time found sojourning or abiding for his health, is the point to which the distance was calculated, in order to determine its admission. *Mutual Ben. L. Ins. Co. v. Robison*, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 724.

Fifth. It cannot be taken before trial, but orally in court where the witness lives within 100 miles from the place of trial, unless other conditions in section 863 were the grounds for taking the deposition. *Ex parte Fisk*, 113 U. S. 713, 725, 28 L. ed. 1117, 1121, 5 Sup. Ct. Rep. 724; *Importers' & T. Nat. Bank v. Lyons*, 134 Fed. 511; *Compania Azucarera Cubana v. Ingraham*, 180 Fed. 516.

Sixth. If the witness is in court when the trial takes place, the deposition cannot be read. *U. S. Rev. Stat. sec. 865*, *U. S. Comp. Stat. 1901*, p. 663; *Whitford v. Clark County*, 119 U. S. 524, 30 L. ed. 500, 7 Sup. Ct. Rep. 306; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 958.

#### *Who may Use Depositions.*

Either party may use any part of a deposition taken by the other side. *H. Scherer & Co. v. Everest*, 94 C. C. A. 346, 168 Fed. 827, and cases cited.

*Special Federal Statutes Controlling Evidence.*

U. S. Rev. Stat. Secs. 883-896, U. S. Comp. Stat. 1901, pp. 669-674, provides for the admission of copies of all documents from the various departments of the government. *United States v. Brelin*, 92 C. C. A. 88, 166 Fed. 104.

Sections 899-901 provide for restoring lost judgments and records of the Federal courts, and their admission in evidence. *Cornett v. Williams* (*Nash v. Williams*) 20 Wall. 226, 22 L. ed. 254; *O'Hara v. Mobile & O. R. Co.* 22 C. C. A. 512, 40 U. S. App. 471, 76 Fed. 718; *Union & Planters' Bank v. Memphis*, 49 C. C. A. 455, 111 Fed. 561; *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25.

Section 905 provides for the admission in evidence of acts of the State legislatures, also the records and judicial proceedings of the courts of States and Territories, and how they are to be authenticated and proved. *Israel v. Israel*, 130 Fed. 237; *Bohlander v. Heikes*, 94 C. C. A. 298, 168 Fed. 886; *National Acci. Asso. v. Spiro*, 37 C. C. A. 388, 94 Fed. 750.

Section 906 provides for the admission of all records and exemplification of books, which may be kept in any public office of any State or Territory, not appertaining to a court. *Williams v. United States*, 137 U. S. 113, 34 L. ed. 590, 11 Sup. Ct. Rep. 43.

Section 907 provides for the admission of copies of foreign records relating to land titles in the United States.

Section 908 provides that the publication of the laws and treaties of the United States by Little, Brown & Co. shall be competent evidence of the public and private acts of Congress and of the treaties therein contained, in all courts of law and equity of the United States and the several States, without further proof.

## CHAPTER XIV.

### BILL OF EXCEPTIONS.

It is indispensable to review the admission or rejection of evidence, or objections to the admission or rejection of a charge given or requested, or objections made to the proceedings in the course of the trial at law, that exceptions to the rulings of the trial court must be taken at the time and preserved for review by a bill of exceptions. The exception should be taken and recorded at the time the objection is made, so as to give the trial court an opportunity to correct the error if any. *Potter v. United States*, 58 C. C. A. 231, 122 Fed. 55, and cases cited; *Key West v. Baer*, 13 C. C. A. 572, 30 U. S. App. 140, 66 Fed. 443; *Kesterson v. LaMoine Lumber & Trading Co.* 193 Fed. 355; *Oxford & C. L. R. Co. v. Union Bank*, 82 C. C. A. 609, 153 Fed. 724; *Yellow Poplar Lumber Co. v. Chapman*, 20 C. C. A. 507, 42 U. S. App. 21, 74 Fed. 448; *Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 369; *Hatcher v. Northwestern Nat. Ins. Co.* 106 C. C. A. 225, 184 Fed. 24; *Star Co. v. Madden*, 110 C. C. A. 652, 188 Fed. 911; *Fellman v. Royal Ins. Co.* 106 C. C. A. 557, 184 Fed. 582; *Preston v. Prather*, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162; *Malony v. Adsit*, 175 U. S. 281, 286; 44 L. ed. 163, 166, 20 Sup. Ct. Rep. 115; *Chicago, B. & Q. R. Co. v. Frye-Bruhn Co.* 106 C. C. A. 217, 184 Fed. 15, and cases cited; U. S. Rev. Stat. sec. 700, U. S. Comp. Stat., 1901, p. 570.

*Not within section 914, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 684.*

Section 953, U. S. Comp. Stat. 1901, p. 696, is the only legislation upon the subject, but the Federal courts do not follow State laws or practice in reserving and making up a bill of exceptions. *Duncan v. Landis*, 45 C. C. A. 666, 106 Fed. 844; *Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 369; *Ghost v. United States*, 94 C. C. A. 253, 168 Fed. 843; *Fellman*

v. Royal Ins. Co. 106 C. C. A. 557, 184 Fed. 582; Ex parte Chateaugay Ore & Iron Co. 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150. It was said in *Ghost v. United States*, supra, that the Federal statutes being silent, the common law is the prevailing practice of the Federal courts, it not being within the conformity statute, U. S. Rev. Stat. section 914.

*Drawing up the Bill.*

The duty of drawing the bill of exceptions, stating distinctly the rulings complained of, and the exceptions taken to them, belongs to the excepting party, and not the court. The trial court has only to consider whether the bill is tendered in due time, in legal form, and conformable to the truth, and the appellate court must determine their validity. *Michigan Ins. Bank v. Ellred*, 143 U. S. 298, 36 L. ed. 163, 12 Sup. Ct. Rep. 450.

*Authentication and Signing.*

By U. S. Rev. Stat. sec. 953, U. S. Comp. Stat. 1901, p. 696, a bill of exception is deemed sufficiently authenticated if signed by the judges of the court in which the cause was tried, or the presiding judge thereof, if more than one judge sat at the trial, without any seal of the court or of the judge annexed thereto. When, by reason of death, sickness, or other disability, the trial judge is unable to hear or pass upon the motion for a new trial and to sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such case has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass on said motion and allow a true bill of exceptions, he shall do so, and his ruling and signing shall be valid; but if not satisfied that he can properly pass on the bill of exceptions, then he may in his discretion grant a new trial.

This statute clearly requires all exceptions taken and allowed to be incorporated in one bill, which is to be authenticated by the signature of the judge. This allowance and signing, then, is a judicial act (*Malony v. Adsit*, 175 U. S. 281-286, 44 L. ed.

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163-166, 20 Sup. Ct. Rep. 115; Oxford, & C. L. R. Co. v. Union Bank, 82 C. C. A. 609, 153 Fed. 725), and cannot be waived by counsel. *Id.* See *Sanborn v. Bay*, 194 Fed. 37 where the bill of exceptions was signed by a judge succeeding the trial judge.

*Time of Presentation of Bill for Allowance.*

The bill must be duly presented to and allowed by the trial judge during the term at which the trial was had; or within the time extended by the trial judge during the term, or, if there be a rule of the court or circuit governing the time for presentation for allowance, it must be followed, or an extension granted within time allowed by the rule. *Miller v. Morgan*, 14 C. C. A. 312, 30 U. S. App. 19, 67 Fed. 82; *Oxford & C. L. R. Co. v. Union Bank*, 82 C. C. A. 609, 153 Fed. 724; *Yellow Poplar Lumber Co. v. Chapman*, 20 C. C. A. 507, 42 U. S. App. 21, 74 Fed. 448. See *Morse v. Anderson*, 150 U. S. 156, 37 L. ed. 1037, 14 Sup. Ct. Rep. 43. Where an order is entered, that "all things stand continued," it covers the bill of exceptions, and the court does not lose control. *Costello v. Ferrarini*, 165 Fed. 379. Or where delay is occasioned by the adverse party or the judge, it may be excused. *Western Dredging & Improv. Co. v. Heldmaier*, 53 C. C. A. 625, 116 Fed. 179; *Franklin County v. Furry*, 75 C. C. A. 465, 44 Fed. 664; *Davis v. Patrick*, 122 U. S. 138, 30 L. ed. 1090, 7 Sup. Ct. Rep. 1102.

*Extending the Time.*

The rules fixing the time for presentation and allowance of a bill of exceptions are directory, and to subserve the ends of justice the trial judge may extend the time, provided the exceptions incorporated in the bill were taken during the trial, and when the matters excepted were offered; and provided, further, the extension was granted within the time allowed by rule for the presentation and allowance of the bill. The trial court cannot extend the time when the application was made, after the time limited by the rule had expired. *Dalton v. Hazelet*, 105 C. C. A.

99, 182 Fed. 561; Franklin County v. Furry, 75 C. C. A. 465, 144 Fed. 664; Southern P. Co. v. Johnson, 16 C. C. A. 317, 44 U. S. App. 1, 69 Fed. 562, and cases cited; United States v. Jones, 149 U. S. 262, 37 L. ed. 726, 13 Sup. Ct. Rep. 840; Scaife v. Western North Carolina Land Co. 30 C. C. A. 661, 59 U. S. App. 28, 87 Fed. 310; Russo-Chinese Bank v. National Bank, 109 C. C. A. 398, 187 Fed. 86; Oxford & C. L. R. Co. v. Union Bank, 82 C. C. A. 609, 153 Fed. 723. See Seattle v. Methodist Protestant Church, 70 C. C. A. 597, 138 Fed. 309, 310. Time cannot be extended by order in vacation. Missouri, K. & T. R. Co. v. Russell, 9 C. C. A. 108, 19 U. S. App. 641, 60 Fed. 503.

*Trial Judge Must Sign Bill.*

We have just seen that section 953, U. S. Comp. Stat. 1901, p. 696, requires the bill of exceptions to be authenticated by the trial judge if not disabled by death, sickness, or other disability, for which event provision has been made. When the bill is properly presented by the plaintiff in error and allowed by the judge, the judge must sign it. Cavazos v. Trevino, 6 Wall. 773, 18 L. ed. 813; Knight v. Illinois C. R. Co. 103 C. C. A. 514, 180 Fed. 371, and cases cited. His name, and not initials, must be signed. Origet v. United States, 125 U. S. 240, 31 L. ed. 743, 8 Sup. Ct. Rep. 846.

Should the judge refuse to sign during the term, mandamus will be granted requiring him to settle the bill and sign it. Scaife v. Western North Carolina Land Co. 30 C. C. A. 661, 59 U. S. App. 28, 87 Fed. 308.

Where extraordinary circumstances prevent the signing of the bill within the term, it creates an exception to the general rule. Michigan Ins. Bank v. Eldred, 143 U. S. 298, 36 L. ed. 163, 12 Sup. Ct. Rep. 450; Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. 81 C. C. A. 76, 151 Fed. 468, and cases cited; Dalton v. Gunnison, 91 C. C. A. 457, 165 Fed. 873; Scaife v. Western North Carolina Land Co. 30 C. C. A. 661, 59 U. S. App. 28, 87 Fed. 308; Western Dredging & Improv. Co. v. Heldmaier, 53 C. C. A. 625, 116 Fed. 179; Bidwell v. Amsinck, 92 C. C. A. 432, 166 Fed. 752.

The signature of the judge to orders allowing and settling the exceptions taken during the progress of the trial is not a signing as contemplated; the entire bill when settled must be signed. *Dalton v. Hazelet*, 105 C. C. A. 99, 182 Fed. 561.

Everything contained in the bill must be certified by the judge's signature. *Jones v. Buckell*, 104 U. S. 554, 26 L. ed. 841.

#### *What the Bill of Exceptions Should Contain.*

Keeping in mind that exceptions raise only questions of law, and that its purpose is to preserve in intelligent form objections made as to the pleadings, evidence, charges, or any other objections raising a legal issue during the progress of the trial, it is indispensable that each exception taken should distinctly state and point out the error relied upon, both as to the matter excepted to and the point reserved; in a word, it must contain within itself a case with a defined issue, and not so framed as to require an examination, by the court, of the entire case to see the error complained of. Rule 10, all circuits (see post, 271); Rule 4, Supreme Court (see post, 242). *The Francis Wright*, 105 U. S. 381-389, 26 L. ed. 1100-1102; *Marion Phosphate Co. v. Cummer*, 9 C. C. A. 279, 13 U. S. App. 604, 60 Fed. 873. It must affirmatively appear that the several exceptions in the bill were taken at the trial, and at the time the objection was made, and that the bill was authenticated after the trial by the judge, during the term, unless it appears the time was extended by the judge. In *United States v. Carey*, 110 U. S. 51, 28 L. ed. 67, 3 Sup. Ct. Rep. 424, it is said that an exception, to be of any avail, must be taken at the trial, but may be reduced to form and signed afterwards. Each exception must state a case, that is, the point of law and the evidence upon which it is based, or if to the admission or rejection of evidence, it must state the substance of the evidence offered and admitted or rejected, and the legal objection made. It must appear that the court below was fully informed as to the point decided. Having seen, then, that each exception should raise a definite point of law, whether it be to the pleadings, charge, or evidence, and that it is only a challenge on some point of law that can invoke the revisory power of an appellate court, let us take up first—

*Exceptions to Charges.*

(See also chapter 15, discussing charges and exceptions.)

By all circuits rule 10 (see post 271) and Supreme Court rule 4 (see post, 242), it is provided that the judges of the district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury upon any general exception to the whole of said charge, but the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those only shall be inserted in the bill of exceptions and allowed by the court. *Morning Journal Asso. v. Rutherford*, 16 L.R.A. 803, 2 C. C. A. 355, 1 U. S. App. 296, 51 Fed. 513; *Masonic Ben. Asso. v. Lyman*, 9 C. C. A. 104, 18 U. S. App. 507, 60 Fed. 498; *Pickham v. Wheeler-Bliss Mfg. Co.* 23 C. C. A. 391, 46 U. S. App. 605, 77 Fed. 663. (See General Exceptions; and When Exceptions to Charge may be Reviewed.)

*General Exceptions to Charge.*

The bill of exceptions cannot be so stated as to draw the whole matter in review, but only separate and distinct points of law, whether to charge given or refused, or the evidence, as general exceptions are not reviewable. *Partridge v. Boston & M. R. Co.* 107 C. C. A. 49, 184 Fed. 211; *Vider v. O'Brien*, 10 C. C. A. 385, 18 U. S. App. 711, 62 Fed. 326; *Philip Schneider Brewing Co. v. American Ice Mach. Co.* 23 C. C. A. 89, 40 U. S. App. 382, 77 Fed. 138; *Block v. Darling*, 140 U. S. 234, 55 L. ed. 476, 11 Sup. Ct. Rep. 832; *Worthington v. Mason*, 101 U. S. 149, 25 L. ed. 848. See chapter 15, post, p. 110.

So, a general exception to refusal of charges will not be considered if any one of the propositions submitted is unsound. *Linehan R. Transfer Co. v. Morris*, 30 C. C. A. 575, 59 U. S. App. 718, 87 Fed. 127; *New England Furniture & Carpet Co. v. Catholicon Co.* 24 C. C. A. 595, 49 U. S. App. 78, 79 Fed. 294; *Waples-Platter Co. v. Turner*, 27 C. C. A. 439, 49 U. S. App. 592, 83 Fed. 64; *Southern P. Co. v. Hetzer*, 1

L.R.A.(N.S.) 288, 68 C. C. A. 26, 135 Fed. 285; Newman v. Virginia, T. & C. Steel & I. Co. 25 C. C. A. 382, 42 U. S. App. 466, 80 Fed. 228. So, an exception to the refusal of the court to give nine separate charges is too vague, without further effort to particularize. Pittsburgh & W. R. Co. v. Thompson, 27 C. C. A. 333, 54 U. S. App. 222, 82 Fed. 720. The bill must show affirmatively the errors alleged; that they were prejudicial; that timely objection was made thereto; and the grounds of objection clearly stated. If it does not, it is fatally defective, it cannot be remedied in the assignment of error. Newman v. Virginia, T. & C. Steel & I. Co. 25 C. C. A. 382, 42 U. S. App. 466, 80 Fed. 228; Linehan R. Transfer Co. v. Morris, 30 C. C. A. 575, 59 U. S. App. 718, 87 Fed. 127. Thus an exception to the charge of the court, "in so far as it is inconsistent with the charges asked," is not reviewable. Partridge v. Boston & M. R. Co. 107 C. C. A. 49, 184 Fed. 211; Phoenix Assur. Co. v. Lucker, 23 C. C. A. 139, 42 U. S. App. 111, 77 Fed. 243.

Again, where no evidence is set out in the bill of exceptions to show the applicability of the charge given or refused, the error, if any, is not reviewable (Phoenix Mut. L. Ins. Co. v. Raddin, 120 U. S. 184, 30 L. ed. 644, 7 Sup. Ct. Rep. 500; Jones v. Buckell, 104 U. S. 554, 26 L. ed. 841; Southwest Virginia Improv. Co. v. Frari, 7 C. C. A. 149, 8 U. S. App. 444, 58 Fed. 172; South Penn Oil Co. v. Latshaw, 49 C. C. A. 478, 111 Fed. 599, 21 Mor. Min. Rep. 600; Yates v. United States, 32 C. C. A. 507, 61 U. S. App. 124, 90 Fed. 57; Merchants' Exch. Bank v. McGraw, 22 C. C. A. 622, 48 U. S. App. 55, 76 Fed. 930, 936), unless the instruction would be erroneous under any state of evidence.

#### *Time When Exceptions to Charge Must be Taken.*

See chapter 15, post, p. 113.

When an exception to a charge is taken after the jury retire, it will not be considered. Yates v. United States, 32 C. C. A. 507, 61 U. S. App. 124, 90 Fed. 57; Dalton v. Moore, 72 C. C. A. 459, 141 Fed. 314, and cases cited. See this last case for extraordinary circumstances where the court modified

the rule to suit the circumstances. Again, see Merchants' Exch. Bank v. McGraw, 22 C. C. A. 622, 48 U. S. App. 55, 76 Fed. 930, where the jury returned for instructions, and they were given in the absence of counsel.

Keep in mind that a charge does not become a part of the record unless incorporated in the bill of exceptions. Being in the record merely presents it to the appellate court as the opinion of the court below transmitted under rule 14, all circuits. Blake v. United States, 18 C. C. A. 117, 33 U. S. App. 376, 71 Fed. 286. (See Charge of Court, chapter 15, post, p. 110, for further discussion of exceptions to charges).

*Motion to Direct Verdict.*

Where a court is moved to charge the jury, by giving peremptory instructions to bring in a verdict for one party or the other, the error, if any, must be brought to the appellate court by a bill of exceptions, containing the motion, the ruling upon it, the objections there made, and the grounds of objection as stated, and the evidence in the case. Sun Pub. Co. v. Lake Erie Asphalt Block Co. 84 C. C. A. 584, 157 Fed. 80; German Ins. Co. v. Frederick, 7 C. C. A. 122, 19 U. S. App. 24, 58 Fed. 148. Whether the court should or should not have instructed the verdict on the evidence is a question of law to be solved by the appellate court; and to do so, the motion, the ruling, the exception taken, and all the evidence, are necessary, and the trial judge should certify the fact. Where the trial judge certified that the bill contained the substance of all the evidence given at the trial, it was held sufficient to enable the appellate court to pass upon the issue. First Nat. Bank v. Moore, 78 C. C. A. 581, 148 Fed. 958; Crowe v. Trickey, 204 U. S. 235, 51 L. ed. 458, 27 Sup. Ct. Rep. 275.

All the facts in the case should appear in the bill of exceptions. The fact that all the evidence appears in the record does not authorize its consideration by the appellate court; it must come up in the bill of exceptions authenticated by the certificate of the trial judge, that it is all the evidence taken. Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. 81 C. C. A. 76, 151 Fed. 468, and cases cited.

In Crowe v. Trickey, *supra*, and Gunnison County v. E. H. Rollins & Son, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390, the objection was that there was no certificate of the trial judge that the bill contained all the evidence, and therefore there could be no review of the action of the trial judge in instructing a verdict; but the court held that it being apparent that the bill of exceptions contained all the evidence, though not certified in express terms, and proceeded to consider the issue.

*When the Exception Should be Taken.*

The exception must be taken when the motion is ruled upon, for if taken after a verdict is returned, then it is of no avail in the appellate court. *Bidwell v. George B. Douglas Trading Co.* 105 C. C. A. 385, 183 Fed. 95, and cases cited; *Mann v. Dempster*, 103 C. C. A. 325, 179 Fed. 837; *Pittsburgh, C. & St. L. R. Co. v. Heck*, 102 U. S. 120, 26 L. ed. 58.

*Exception to Action of the Court on the Pleadings.*

Where a part or all of a pleading is stricken out on motion over objections of the party pleading, the motion, the ruling, and exception taken at the time, with grounds of objection, should be incorporated in the bill. *Ghost v. United States*, 94 C. C. A. 253, 168 Fed. 842, and cases cited. *Dietz v. Lymer*, 10 C. C. A. 71, 19 U. S. App. 663, 61 Fed. 792; *Denver & R. G. R. Co. v. Wagner*, 92 C. C. A. 527, 167 Fed. 75.

*Exception as to Ruling on Evidence.*

Where the objection is as to a ruling on evidence either admitting or rejecting it, the bill should contain the objectionable evidence ruled upon, and the exceptions to its admissibility or rejection taken when the ruling was made, that is, the grounds either for its admissibility or rejection offered when the ruling was made should clearly appear, as other and differ-

ent grounds raised in the appellate court will not be considered, as we will hereafter see. *Erie R. Co. v. Schomer*, 96 C. C. A. 458, 171 Fed. 800; *Lake Shore & M. S. R. Co. v. Eder*, 98 C. C. A. 556, 174 Fed. 944; *Boston & A. R. Co. v. O'Reilly*, 158 U. S. 335, 39 L. ed. 1007, 15 Sup. Ct. Rep. 830, and cases cited; *Roberts v. Graham*, 6 Wall. 578, 18 L. ed. 791; *Patrick v. Graham*, 132 U. S. 627, 33 L. ed. 460, 10 Sup. Ct. Rep. 194; *Sun Pub. Co. v. Lake Erie Asphalt Block Co.* 84 C. C. A. 584, 157 Fed. 80; *Atlantic Coast Line R. Co. v. Linstedt*, 106 C. C. A. 238, 184 Fed. 36; *Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co.* 81 C. C. A. 76, 151 Fed. 468. But the bill may incorporate the evidence by appropriate reference. *Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co.* 81 C. C. A. 76, 151 Fed. 468; *Jones v. Buckell*, 104 U. S. 554, 26 L. ed. 841. The bill of exceptions alone brings up the evidence; if not there, the court cannot consider it. The reasons of the court for its conclusions embraced in the opinion cannot be treated as a special finding, nor for helping the findings, or to modify and control the findings. *Pacific Sheet Metal Works v. California Canneries Co.* 91 C. C. A. 108, 164 Fed. 984, and cases cited. The general objection of irrelevancy, incompetency or immateriality is futile if not clearly apparent or evidently discernible without a statement. *Guarantee Co. of N. A. v. Phoenix Ins. Co.* 59 C. C. A. 376, 124 Fed. 175.

Where there is an offer to prove a particular fact by a witness, which is refused, the bill of exception should state the name of the witness, what it was expected to be proved by him, the refusal to let the witness testify, the materiality of the evidence, the exception taken to the ruling and the ground stated upon which the evidence was ruled out. *Press Pub. Co. v. Monteith*, 103 C. C. A. 502, 180 Fed. 359, 360. So, overruling a motion to strike out, or to instruct a jury to disregard evidence admitted, must be excepted to when the ruling is made. It must show the evidence sought to be stricken out, or to be disregarded, the ruling of the court stated, the exception taken, and, if necessary, so much of the evidence in the case as to show wherein the action is erroneous. *Star Co. v. Madden*, 110 C. C. A. 652, 188 Fed. 910. The presumption is that the ruling of the court below is correct; and to attack the case on

the ground that the ruling on evidence was erroneous, the evidence must be produced in the appellate court, under all the circumstances which induced the ruling below, or the judgment must be affirmed. *Boatmen's Bank v. Trower Bros. Co.* 104 C. C. A. 314, 181 Fed. 809, and cases cited.

*Cannot be Waived.*

The bill of exceptions cannot be waived by parties (*Malony v. Adsit*, 175 U. S. 281-286, 44 L. ed. 163-166, 20 Sup. Ct. Rep. 115), nor by affidavits or otherwise (*Metropolitan R. Co. v. District of Columbia* [*Metropolitan R. Co. v. Mcfarland*], 195 U. S. 322, 49 L. ed. 219, 25 Sup. Ct. Rep. 28).

*When Bill of Exception Not Necessary.*

No exception is necessary in appealing from an order of dismissal. *Willis v. Davis*, 107 C. C. A. 211, 184 Fed. 889, 890. When finding of fact by the judge is special, no exception is necessary to review its sufficiency to support the judgment. (See *Effect of Findings of Fact by the Judge.*) Judgment of nonsuit is reviewable without exception. *Worthington v. McGough*, 112 C. C. A. 662, 192 Fed. 512.

*Amending the Bill.*

In *Michigan Ins. Co. v. Eldred*, 143 U. S. 298, 36 L. ed. 163, 12 Sup. Ct. Rep. 450, it is said the duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of, and exceptions taken to them, belongs to the excepting party, and not to the court. The trial court has only to consider whether the bill tendered is in due time, in legal form, and is conformable to the truth. Any fault or omission in framing or tendering the bill of exceptions cannot be amended at a subsequent term, as a misprision of the clerk in recording inaccurately.

This latter clause would not apply if in fact the charge or evidence was contained in the bill of exceptions when taken and authenticated, but omitted by the clerk from the record.

Stimpson v. Westchester R. Co. 3 How. 553, 11 L. ed. 722. See Franklin County v. Furry, 75 C. C. A. 465, 144 Fed. 664.

The above rule applies after the bill has been settled and signed by the trial judge.

It seems an exception, though not taken, may in the discretion of the court be inserted in the bill, and his action is not reviewable. Reader v. Haggin, 160 Fed. 909. You cannot file an amended bill after the case has been argued in the appellate court. Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. 81 C. C. A. 76, 151 Fed. 466. It may be amended to conform to the fact. Herencia v. Guzman, 219 U. S. 44, 55 L. ed. 81, 31 Sup. Ct. Rep. 135. The bill cannot be filed *nunc pro tunc* after the term, unless the court by some order has kept control of the case. Reader v. Haggin, 88 C. C. A. 91, 160 Fed. 909; Jennings v. Philadelphia, B. & W. R. Co. 218 U. S. 255, 54 L. ed. 1031, 31 Sup. Ct. Rep. 1.

#### *Notice of Filing the Bill of Exceptions.*

Where a rule requires notice to the adverse party of filing and settling the bill of exceptions, it should be followed. However, if the bill is signed by the judge it will be acted on, though no notice appears in the record. See Russo-Chinese Bank v. National Bank, 109 C. C. A. 398, 187 Fed. 86.

#### *Form of Notice.*

A. B. }  
vs. } At Law. Case No. ....  
C. D. }

To ..... Attorney of Record for .....

Please take notice that I have this, the .... day of ....., A. D.,.... filed in the office of the Clerk of the District Court of the United States in which this case is pending a bill of exceptions to the rulings of the Court in the trial of the above cause, and the same has been presented to the Hon. ...., who tried the case, for approval and settlement, a copy of which is herewith served upon you.

.....,  
Atty. for .....

The adverse attorney may appear upon this notice or he may appear without notice, in settling the bill by the judge, and offer such amendments and changes as he deems most conformable to the actual facts. If the amendments or changes, or any of them, proposed, are allowed, the court may enter an order to that effect as follows:

**Style and No. of the Case.**

This Cause coming on to be heard on the bill of exceptions as presented by the ..... ...., and amendments or changes as offered by the ..... .... and ..... .... counsel, and the court having considered the same, it is ordered that the amendments as proposed by the ..... ...., counsel to ..... .... Exceptions numbered 1, 5, 7 are allowed, and that all other amendments, suggestions, and changes offered are not allowed.

..... .....

Date.

Judge.

***Form of Bill of Exceptions to Evidence Taken.***

In District Court of the United States for the Northern District of ..... , sitting at ..... , in the State of .....

A. B. }  
vs. } At Law. Cause No. ....  
C. D. }

Be it remembered that in the trial of this cause, on the ..... day of ..... , A. D., 19.., the Hon. ..... , presiding, both parties appearing by counsel. A jury was duly impaneled and the following proceedings had:

1. John Smith being on the witness stand, being duly sworn as a witness for plaintiff was asked by defendant's counsel the following question (here state question, objection made, and what was intended to be shown). The court refused to allow the question, and defendant excepted to the ruling of the court, which exception was allowed.

2. Plaintiff being on the stand was asked by his counsel to produce in evidence a certain paper in his possession. The paper being produced and examined by counsel for defendant, he objected to its introduction (here state paper in words and figures, objection made to it, etc.), which objection was overruled, to which defendant's counsel excepted, which exception was then and there allowed.

And the defendant prays that this his bill of exceptions may be allowed, settled, and signed.

.....,

Counsel for defendant.

Settled and allowed this the .... day of ....., A. D., 19.., in term.

.....,

Judge.

We have seen that the opposite counsel may appear before the judge in settling the bill of exceptions either upon or without notice and may file his objections or amendments offered to each exception in the bill, which may be rejected or allowed by the judge by order as heretofore stated. (See form of order, ante, p. 108.)

## CHAPTER XV.

### CHARGE TO JURY.

In charging the jury, the Federal courts are not bound by State laws or practice, for charging the jury is a function of the personal administration of the judge, and does not fall within the provisions of the conformity act, sec. 914, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 684, for it is neither practice, proceeding, nor pleading. Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286; Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co. 66 C. C. A. 543, 133 Fed. 713, 714; Knight v. Illinois C. R. Co. 103 C. C. A. 514, 180 Fed. 372.

The charge may be oral or written.

#### *Charge Must be Applicable to the Issues.*

The general charge or special charges requested by either party must be applicable to the issues. J. W. Bishop Co. v. Dodson, 81 C. C. A. 346, 152 Fed. 128; Beaver Hill Coal Co. v. Lassilla, 100 C. C. A. 283, 176 Fed. 725. And where there is no evidence to support the allegations of a pleading, the other party is entitled to a charge that no recovery can be had on the court. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412.

#### *May Comment on the Evidence in Charging the Jury.*

State laws forbidding commenting on the evidence in charging the jury, either orally or in writing, do not control the Federal trial judges. Nudd v. Burrows, 91 U. S. 441, 23 L. ed. 290; Lincoln v. Power, 151 U. S. 442, 38 L. ed. 227, 14 Sup. Ct. Rep. 387. The judge may comment on the evidence fairly and impartially, to more clearly define the issues and assist the jury in reaching a conclusion (Mead v. Darling, 86 C. C. A. 552, 159 Fed. 684; California Ins. Co. v. Union Compress Co.

133 U. S. 417, 33 L. ed. 738, 10 Sup. Ct. Rep. 365; Sommers v. Carbon Hill Coal Co. 91 Fed. 337; Texas & P. R. Co. v. Cox, 145 U. S. 608, 36 L. ed. 834, 12 Sup. Ct. Rep. 905; Knight v. Illinois C. R. Co. 103 C. C. A. 514, 180 Fed. 372, and cases cited); and may express an opinion on the facts (Id. 369).

While the judge may comment on the evidence, and express an opinion as to the facts, the jury at last must determine the fact, and may by their verdict dissent from the view of the court as to the facts; in a word, whatever may be the opinion of the court as to the credibility of a witness or the facts testified to, the jury must ultimately determine as to the truth of the testimony, and the judge should so charge them. If the jury are told substantially that it is their province alone to determine the facts without reference to the opinions expressed by the court, then the expression of opinion by the court, though erroneous, is not reviewable, if the court has stated the law of the case to them correctly. Union P. R. Co. v. Thomas, 81 C. C. A. 491, 152 Fed. 371, and cases cited; Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co. 52 C. C. A. 95, 114 Fed. 142; Lovejoy v. United States, 128 U. S. 171, 32 L. ed. 389, 9 Sup. Ct. Rep. 57; Nyback v. Champagne Lumber Co. 48 C. C. A. 632, 109 Fed. 737. But he must take care to separate the law from the facts, and leave the latter in unequivocal terms to the judgment of the jury, for the jury must be free to exercise their own judgment. *Ibid.*

#### *When Special Charges May be Refused.*

When the general charge substantially covers the case, and was all that was necessary to give the jury an intelligent understanding of the law applicable to the facts, the court may refuse special charges offered. Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 29 L. ed. 712, 6 Sup. Ct. Rep. 481; Norfolk & P. Traction Co. v. Rephan, 110 C. C. A. 254, 188 Fed. 284, 285; International Banking Corp. v. Payne, 110 C. C. A. 418, 188 Fed. 40; Southern R. Co. v. Terrell, 108 C. C. A. 377, 186 Fed. 299; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 295, 23 L. ed. 899; Ruch v. Rock Island, 97 U. S. 695, 24 L.

ed. 1102; Northwestern Mut. L. Ins. Co. v. Muskegon Nat. Bank, 122 U. S. 510, 30 L. ed. 1103, 7 Sup. Ct. Rep. 1221; Meyer v. Richards, 49 C. C. A. 344, 111 Fed. 297; Simmons Co. v. Eskridge, 186 Fed. 676; Coulter v. B. F. Thompson Lumber Co. 74 C. C. A. 38, 142 Fed. 706; Mountain Copper Co. v. Van Buren, 66 C. C. A. 151, 133 Fed. 7, and cases cited.

Again, under sec. 918, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 685, authorizing courts to make their own rules, when the court entered a rule that special charges should be presented before the argument began, it was not error to refuse such charges presented after the argument began. Atchison, T. & S. F. R. Co. v. Hamble, 101 C. C. A. 270, 177 Fed. 652.

#### *When Charges are Asked in the Aggregate.*

When charges are asked in the aggregate, by counsel, if there be any objectionable the whole may be refused. Morgan v. United States, 94 C. C. A. 518, 169 Fed. 242-250, and cases cited; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 295, 23 L. ed. 899; Moulor v. American L. Ins. Co. 111 U. S. 338, 28 L. ed. 448, 4 Sup. Ct. Rep. 466; Mann Boudoir Car Co. v. Dupre, 21 L.R.A. 289, 4 C. C. A. 540, 13 U. S. App. 183, 54 Fed. 650; Armour & Co. v. Kollmeyer, 16 L.R.A.(N.S.) 1110, 88 C. C. A. 242, 161 Fed. 84, and cases cited. Or when charges asked contain two or more propositions of law, and one is erroneous, the charge should be refused. Ibid.; Chicago, R. I. & P. R. Co. v. Hale, 99 C. C. A. 379, 176 Fed. 72.

#### *When General Charge Incomplete.*

If the general charge is believed to be incomplete in the statement of the law to the facts, special charges should be asked to complete it. No general exception to the charge under these circumstances can avail. Cincinnati Traction Co. v. Leach, 95 C. C. A. 47, 169 Fed. 549, 550, and cases cited; United States Smelting Co. v. Parry, 92 C. C. A. 159, 166 Fed. 416; McDermott v. Severe, 202 U. S. 600, 50 L. ed. 1162, 26 Sup. Ct. Rep. 709; Southern P. Co. v. Maloney, 69 C. C. A. 83, 136 Fed. 171; Chicago G. W. R. Co. v. McDonough, 88 C. C.

A. 517, 161 Fed. 657; Central Union Depot & R. Co. v. Mansfield, 95 C. C. A. 142, 169 Fed. 615, 617; Coney Island Co. v. Dennan, 79 C. C. A. 375, 149 Fed. 692. And the requested charge must be sufficiently definite to direct the attention of the court to the error. Coney Island Co. v. Dennan, 79 C. C. A. 375, 149 Fed. 687; Washington & G. R. Co. v. Varnell, 98 U. S. 485, 25 L. ed. 235; Stewart v. Morris, 37 C. C. A. 562, 96 Fed. 703.

*When Exceptions to the Charge Must be Taken.*

Exceptions to a charge, given or refused, must be taken before the jury retire. Park Bros. & Co. v. Bushnell, 9 C. C. A. 140, 20 U. S. App. 425, 60 Fed. 583; Hickory v. United States, 151 U. S. 316, 38 L. ed. 176, 14 Sup. Ct. Rep. 334; Hindman v. First Nat. Bank, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 934; Commercial Travelers' Mut. Acci. Asso. v. Fulton, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; Sternenberg v. Mailhos, 39 C. C. A. 408, 99 Fed. 46; Berwind-White Coal Co. v. Firment, 95 C. C. A. 1, 170 Fed. 151. Exceptions taken after the jury retire are too late. Klaw v. Life Pub. Co. 76 C. C. A. 154, 145 Fed. 185; Bracken v. Union P. R. Co. 5 C. C. A. 548, 12 U. S. App. 421, 56 Fed. 448, 450; Price v. Pankhurst, 3 C. C. A. 551, 10 U. S. App. 497, 53 Fed. 312; Mann v. Dempster, 103 C. C. A. 325, 179 Fed. 837; Phelps v. Mayer, 15 How. 160, 14 L. ed. 643. So objections to remarks of the trial court made during the trial must be taken when made. Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 535, 540, 52 L. ed. 608, 610, 28 Sup. Ct. Rep. 367. And unless so taken, you cannot assign error for review. Levi v. Mathews, 76 C. C. A. 122, 145 Fed. 152; Louisville & N. R. Co. v. Womack, 97 C. C. A. 559, 173 Fed. 753-759; Tromp v. William Cramp & Sons 1 Ship & Engine Bld. Co. 75 C. C. A. 75, 143 Fed. 867, and cases cited; Wabash Screen Door Co. v. Lewis, 106 C. C. A. 402, 184 Fed. 260; Hinds v. Hinchman Renton Fireproofing Co. 91 C. C. A. 325, 165 Fed. 339, 340; Chesapeake & O. R. Co. v. Dandridge, 96 C. C. A. 178, 171 Fed. 74; Western Invest. Co. v. McFarland, 91 C. C. A. 504, 166 Fed. 77. See Dalton v. Moore, 72 C. C. A. 459, 141

Fed. 315, where the court relaxed the rule, which was held not error.

*General Exception to the Whole Charge.*

By rule 10 of all the circuits (see post, p. 271), it is provided that "the judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large, upon any general exception to the charge of the court at large; but the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and these matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court." Rule 4, Supreme Court (see post, p. 242). Columbus Constr. Co. v. Crane Co. 41 C. C. A. 189, 101 Fed. 55; Tracy v. Eggleston, 47 C. C. A. 357, 108 Fed. 330; Baggs v. Martin, 47 C. C. A. 175, 108 Fed. 34. However, it is held that where the whole charge is substantially wrong a general exception may be allowed. Anthony v. Louisville & N. R. Co. 132 U. S. 173, 33 L. ed. 302, 10 Sup. Ct. Rep. 53, and cases cited. But, as before said, not where the charge contains several distinct propositions of law, and any one of them is unobjectionable. Kansas City S. R. Co. v. Prunty, 66 C. C. A. 163, 133 Fed. 21; Pennsylvania Co. v. Whitney, 95 C. C. A. 70, 169 Fed. 573-577, and cases cited; Chicago, R. I. & P. R. Co. v. Hale, 99 C. C. A. 379, 176 Fed. 75, and cases cited. The rule is that a general exception to a charge embodying several propositions of law, which specifies no ground of objection to any of the propositions therein, is of no avail if any be good. Union P. R. Co. v. Thomas, 81 C. C. A. 491, 152 Fed. 372; Chicago, R. I. & P. R. Co. v. Hale, 99 C. C. A. 379, 176 Fed. 75; Partridge v. Boston & M. R. Co. 107 C. C. A. 49, 184 Fed. 211; Hutchinson Cooperage Co. v. Snider, 46 C. C. A. 517, 107 Fed. 633; Holloway v. Dunham, 170 U. S. 615, 42 L. ed. 1165, 18 Sup. Ct. Rep. 784; Newport News & M. Valley Co. v. Pace, 158 U. S. 36, 39 L. ed. 887, 15 Sup. Ct. Rep. 743; Thiede v. Utah, 159 U. S. 510-521, 40 L. ed. 237-243, 16 Sup. Ct. Rep. 62; Hindman v. First Nat. Bank, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 935, and

cases cited. So, alleged inconsistencies in a charge must be excepted to in order to be a basis for error. *Ware v. Pearsons*, 98 C. C. A. 364, 173 Fed. 879.

*Where a Legal Proposition in Court's Charge is Erroneous.*

Where a legal proposition in a court's charge is material and erroneous, and is properly excepted to, the legal presumption is that it produced prejudice, though in other parts of the charge the true rule was stated. It would be impossible to tell by which the jury was governed. It must be beyond doubt that the error challenged did not prejudice for the court to say it was not sufficient ground for reversal. *Armour & Co. v. Russell*, 6 L.R.A.(N.S.) 602, 75 C. C. A. 416, 144 Fed. 615, 616, and cases cited; *St. Louis, I. M. & S. R. Co. v. Needham*, 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 377; *Choctaw, O. & G. R. Co. v. Holloway*, 52 C. C. A. 260, 114 Fed. 458; *Richards v. United States*, 99 C. C. A. 401, 175 Fed. 944, and cases cited; *Mutual Reserve L. Ins. Co. v. Heidel*, 88 C. C. A. 477, 161 Fed. 539, and cases cited.

Again, where an instruction contains a specific proposition of law on a particular subject, a general exception is sufficient to challenge its correctness (*Pritchett v. Sullivan*, 104 C. C. A. 624, 182 Fed. 480); but it must be entire and contain but a single proposition (*Felton v. Newport*, 34 C. C. A. 470, 92 Fed. 470; *Hindman v. First Nat. Bank*, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 934).

*When Charge Excepted to, What Bill of Exceptions Must Contain.*

It is indispensable to a review of a ruling on instructions of the court, that it should be challenged by an exception taken and recorded at the time; the purpose is to draw the attention of the trial judge distinctly to the error, if any that he may correct it. *American Smelting & Ref. Co. v. Karapa*, 97 C. C. A. 517, 173 Fed. 609, and cases cited.

By rule 10 of the Federal circuit, "the party excepting must state distinctly the several matters of law in the charge to

which he excepts, and those matters only shall be inserted in the bill of exceptions, and allowed by the court." Rule 4 Supreme Court rules (see post, p. 242). Columbus Constr. Co. v. Crane Co. 41 C. C. A. 189, 101 Fed. 55; American Smelting & Ref. Co. v. Karapa, 97 C. C. A. 517, 173 Fed. 607; Stewart v. Morris, 37 C. C. A. 562, 96 Fed. 703; Hutchinson Cooperage Co. v. Snider, 46 C. C. A. 517, 107 Fed. 633; Central Union Depot & R. Co. v. Mansfield, 95 C. C. A. 142, 169 Fed. 615. So, then, a single exception to a part of the charge which embraces more than one proposition of law, does not meet the requirements. The following form has been proposed:

"The plaintiff excepts to the ruling of the court that (state a single proposition, or matter of law) as shown by the following portion of the charge" (setting it out).

In Columbus Constr. Co. v. Crane Co. 41 C. C. A. 189, 101 Fed. 56, it is said "that it is an erroneous assumption that this rule requires the party to state the grounds of the exception; he must only state the proposition, or matter of law excepted to." Ward v. Cochran, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230. It is in assignments of error under rule 11 of all the circuits (see post, p. 272) that the grounds of objection are to be set forth.

*As to the Evidence in the Bill.*

The design of the bill of exceptions being only to raise a point of law, whether in the charge, or in the admission or rejection of evidence, it should state definitely the distinct proposition of law in the charge, or portion of the charge objected to and claimed to be erroneous; to be accompanied with so much of the testimony as may be necessary to explain the exception and issue involved therein. In a word, the exception should be within itself a substantial case, as the court is not expected to look beyond the exception to understand the issue. Scaife v. Western North Carolina Land Co. 30 C. C. A. 661, 59 U. S. App. 28, 87 Fed. 310; Sternberg v. Mailhos, 39 C. C. A. 408, 99 Fed. 46; Newport News & O. P. R. & Electric Co. v. Yount, 69 C. C. A. 363, 136 Fed. 589; Reed v. Gardner, 17 Wall. 411,

21 L. ed. 665; Southwest Virginia Improv. Co. v. Frari, 7 C. C. A. 149, 8 U. S. App. 444, 58 Fed. 172. The evidence appearing in some other part of the record is not sufficient; it must be incorporated in the bill of exceptions as a part thereof, or by direct reference in the bill of exceptions to the part of the record containing the evidence to be considered. Newport News & O. P. R. & Electric Co. v. Yount, 69 C. C. A. 363, 136 Fed. 590; Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. 81 C. C. A. 76, 151 Fed. 468, 469, citing Jones v. Buckell, 104 U. S. 554, 26 L. ed. 841. The bill of exceptions to the charge or portions thereof must not contain all the evidence, nor all of the charge, is the general rule (Scaife v. Western North Carolina Land Co. 30 C. C. A. 661, 59 U. S. App. 28, 87 Fed. 310, and authorities cited), unless the alleged error to be reviewed requires consideration of all the evidence or all the charge. As where special requests for charges are refused and excepted to, the bill of exceptions should contain all the charge, so that the appellate court may determine whether the general charge does not cover the special charges asked. National Cash Register Co. v. Salling, 97 C. C. A. 334, 173 Fed. 22; Johnson v. Willapa Lumber Co. 97 C. C. A. 494, 173 Fed. 488. Or where instructions for a verdict is asked upon the evidence, then all the evidence must be set forth "in the bill." Otherwise rule 10 of all the circuits (see post, p. 271) must be strictly pursued.

*Form of Exception When Charges are Refused, or Claimed to Have Been Erroneous.*

The following form is suggested, as a substantial compliance with the practice in the Federal courts.

In the District Court of the United States for  
the ..... District of .....

A. B. }  
vs.      } Suit at Law.  
C. D. }

(Describe briefly the nature of the cause and recovery sought as shown by the pleadings) and proceed—

Be it remembered that this cause coming on for trial on the ..... day of ....., A. D., ...., before the Hon. ...., Dis-

trict Judge, presiding, all parties being represented by counsel, a jury was impaneled and the case proceeded to trial. After the evidence was concluded and before the argument of counsel began, counsel for (plaintiff or defendant) asked the court to give the following special charge (here set forth in full the charge asked) based upon the following evidence admitted in the trial of the cause (or upon an agreed statement of facts) as follows. (Here state so much of the evidence or agreed statement as will show clearly the bearing of the ruling on the issue involved.)

The court having refused to give the special charge as asked, counsel excepted to the ruling of the court, and tendered this his bill of exceptions, and the court has signed and sealed the same.

(Or, when the objection is to the charge of the court or some part thereof say)

In the charge of the court to the jury, the court gave the following instruction (here state the particular instruction excepted to), to which counsel for ..... , duly excepted, tendered his bill of exceptions, and the court signed and sealed the same.

(Or where the exception is to the refusal of court to instruct a peremptory verdict in favor of one of the parties, whether on the ground of the evidence, or the law controlling the case, say)

To which ruling of the court counsel for ..... excepted, and tendered his bill of exception, and the court signed and sealed the same.

(Then proceed) The jury after the charge of the court retired to consider of their verdict, and returned into open court a verdict in favor of ..... for the sum of ..... (or whatever the verdict found).

Whereupon counsel for ..... presents the foregoing as his bill of exceptions in the case, and prays that the same may be settled and allowed as provided by the rules and practice of the court.

.....,  
Atty. for .....

As to extending time for filing, or settling, or amending the bill of exceptions, etc., see Bill of Exceptions.

#### *Motion for Instructed Verdict.*

And now comes the defendant C. D. by his attorneys in the above-entitled cause, and at the conclusion of all the evidence offered by both parties in the case, moves the court to direct a verdict for the defendant C. D. upon the cause of action asserted in plaintiff's petition, and to instruct the jury to return a verdict for the defendant (or if defendant has a cross-action for which a peremptory instruction is asked, say, to instruct the jury to return a verdict for defendant on its cross action) for the sum of ..... dollars, as prayed for therein, with interest, etc.

Respectfully submitted,

.....,  
Counsel for C. D.

*Plaintiff's Exception to the Court's Instruction.*

A. B. }  
vs. } At Law. Cause No. ....  
C. D. }

Be it remembered that on this the ..... day of ...., the court on motion of the defendant C. D., having instructed the jury to bring in a verdict for the defendant (or a verdict for the defendant on his cross action etc.) the plaintiff there in open court and before said cause was submitted to the jury, and before said jury retired, made and filed his exception to said instructions in writing. The objections to said charge being stated as follows:

1st. Plaintiff excepts to the peremptory instruction for defendant in charging the jury to return a verdict for the defendant upon the cause of action set forth in plaintiff's petition (or in charging the jury to return a verdict for defendant on his cross-action, etc.) because it takes from the jury the consideration of plaintiff's evidence upon the question as to whether, etc. (stating some material issue upon which conflicting evidence was offered).

2d. It took from the jury the right to pass upon the facts showing a distinct liability of defendant to plaintiff as alleged in his petition.

3d. It takes from the jury the right to pass on the contract sued upon, which was sustained by evidence offered in the cause (or which is shown in the facts agreed upon).

....., Counsel for Plaintiff.

The exception should contain all the evidence admitted in the trial of the cause. As to instructing a verdict, see Withdrawing Case from Jury.

## CHAPTER XVI.

### VERDICT.

The form and effect of the verdict in actions at law are matters in which the circuit courts of the United States are governed by the practice of the courts of the State, says the Supreme Court in *Glenn v. Sumner*, 132 U. S. 156, 33 L. ed. 301, 10 Sup. Ct. Rep. 41, citing sec. 914, U. S. Comp. Stat. 1901, p. 684, and *Bond v. Dustin*, 112 U. S. 604, 28 L. ed. 835, 5 Sup. Ct. Rep. 296; *Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 372. But the cases are not harmonious. See *St. Charles v. Stookey*, 85 C. C. A. 494, 154 Fed. 778, and cases cited. But I take it that the departure from conformity with State practice would only arise where to conform would prevent the just administration of justice in the particular case in the light of their system of jurisprudence.

### *Effect of the Verdict.*

General verdicts are conclusive of the facts in a court of error. The remedy is a motion for a new trial. *Hayden v. Ogden Sav. Bank*, 85 C. C. A. 558, 158 Fed. 90; *Omaha Water Co. v. Schamel*, 78 C. C. A. 68, 147 Fed. 504; *Glenn v. Sumner*, 132 U. S. 157, 33 L. ed. 301, 10 Sup. Ct. Rep. 41; *Herencia v. Guzman*, 219 U. S. 44, 45, 55 L. ed. 81, 82, 31 Sup. Ct. Rep. 135, and cases cited. Can only be cured by motion for new trial. *Duke v. St. Louis & S. F. R. Co.* 172 Fed. 684; *Ætna Indemnity Co. v. J. R. Crowe Coal & Min. Co.* 83 C. C. A. 431, 154 Fed. 546. The only review that can be had as to the finding of fact by a jury is when there is no evidence to support it; further than to determine this fact the appellate court will not go. *Boatmen's Bank v. Trower Bros. Co.* 104 C. C. A. 314, 181 Fed. 806, and cases cited.

*Effect in a Court of Error.*

The assignment that the verdict was excessive will not be considered on review; we have seen that it can only be cured by motion for a new trial. *Duke v. St. Louis & S. F. R. Co.* 172 Fed. 684; *Beaver Hill Coal Co. v. Lassilla*, 100 C. C. A. 283, 176 Fed. 725; *Toledo, St. L. & W. R. Co. v. Kountz*, 94 C. C. A. 244, 168 Fed. 835; *Sun Pub. Co. v. Lake Erie Asphalt Block Co.* 84 C. C. A. 584, 157 Fed. 80; *Omaha Water Co. v. Schamel*, 78 C. C. A. 68, 147 Fed. 509, and cases cited; *Nelson v. Bank of Fergus County*, 84 C. C. A. 609, 157 Fed. 162, 13 Ann. Cas. 811; *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. Rep. 356; *Aetna L. Ins. Co. v. Ward*, 140 U. S. 76, 35 L. ed. 371, 11 Sup. Ct. Rep. 720. (See *Remittitur*.) Nor that it is against the weight of evidence. *Ibid.*; *E. I. Dupont Co. v. Waddell*, 101 C. C. A. 335, 178 Fed. 407; *Eastern & W. Lumber Co. v. Rayley*, 85 C. C. A. 296, 157 Fed. 532; *Chicago, M. & St. P. R. Co. v. Anderson*, 94 C. C. A. 241, 168 Fed. 901; *Mt. Vernon Refrigerating Co. v. Fred W. Wolf Co.* 110 C. C. A. 200, 188 Fed. 168; *Hemple v. Raymond*, 75 C. C. A. 526, 144 Fed. 797; *Transit Development Co. v. Cheatham Electric Switching Device Co.* 194 Fed. 964. The court can only look to see if there is any evidence to support the verdict. *Swensen v. Cunningham*, 85 C. C. A. 146, 157 Fed. 753. To assign error that there was no evidence to support a verdict, the question should be presented by a motion to instruct a verdict, and setting forth in the bill of exceptions the motion, the ruling, the exceptions taken, and the evidence upon which the motion was predicated. *Sun Pub. Co. v. Lake Erie Asphalt Block Co.* 84 C. C. A. 584, 157 Fed. 80; *Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 369; *Missouri, K. & T. R. Co. Collier*, 88 C. C. A. 127, 157 Fed. 348.

*Directing a Verdict.*

We have already seen, in chapter 10, under *Withdrawing the Case From the Jury*, that where there is no evidence to

support the plaintiff's case, or the defendant's defense where the plaintiff has shown a *prima facie* case by his evidence, the court may instruct the verdict to be found by the jury. Or where the evidence is such, that after allowing all justifiable inferences, it would not support a verdict, the court may instruct a verdict. We have also seen that a rule of the States which requires the submission of the case "on a scintilla of evidence" to the jury does not apply in the Federal courts, as the question of the sufficiency of the evidence is one of law for the court. So, again, where the evidence is so conclusive that the court in the exercise of a sound judicial discretion would be compelled to set aside the verdict, the trial judge should direct the verdict to be found by the jury. *Postal Teleg. Cable Co. v. Grantham*, 109 C. C. A. 370, 187 Fed. 52; *Louisville & N. R. Co. v. Roberts*, 101 C. C. A. 202, 177 Fed. 922; *Travelers' Ins. Co. v. Selden*, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285; *Washington Mills v. Cox*, 85 C. C. A. 154, 157 Fed. 634.

The court in exercising his discretion under these conditions must look at the evidence most favorably to the party against whom the direction of the verdict is asked. *Erie R. Co. v. Rooney*, 108 C. C. A. 118, 186 Fed. 19, and cases cited; *Pennsylvania R. Co. v. Forstall*, 87 C. C. A. 73, 159 Fed. 893; *Sonnenberg v. Southern P. Co.* 87 C. C. A. 64, 159 Fed. 884.

Again, where the evidence is contrary to reason or opposed to natural physical laws, so that it cannot support a verdict, the court may direct the verdict. *Pennsylvania Co. v. Whitney*, 95 C. C. A. 70, 169 Fed. 573; *Columbia Box & Lumber Co. v. Drown*, 84 C. C. A. 269, 156 Fed. 462; *Baltimore & O. R. Co. v. O'Neill*, 108 C. C. A. 115, 186 Fed. 15, see *Rochford v. Pennsylvania Co.* 98 C. C. A. 105, 174 Fed. 84; *Missouri, K. & T. R. Co. v. Collier*, 88 C. C. A. 127, 157 Fed. 347.

Where a motion to instruct a verdict is sustained, the verdict should be returned and entered as directed. *Bowman v. Atchison, T. & S. F. R. Co.* 106 C. C. A. 651, 184 Fed. 699, 700; *Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307. See *Moore v. Petty*, 68 C. C. A. 306, 135 Fed. 668.

*When Motion to Direct Verdict is Waived.*

The motion to direct a verdict is waived if no exception is taken, or where evidence is offered by the defendant after his motion is made and overruled. *Fidelity & C. Co. v. Thompson*, 11 L.R.A.(N.S.) 1069, 83 C. C. A. 324, 154 Fed. 484, 12 Ann. Cas. 181; *School Dist. No. 11 v. Chapman*, 82 C. C. A. 35, 152 Fed. 887; *Newport News & M. Valley Co. v. Pace*, 158 U. S. 36, 39 L. ed. 887, 15 Sup. Ct. Rep. 743; *National Bank v. Schufelt*, 76 C. C. A. 187, 145 Fed. 509; *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591.

*When Motion to Direct a Verdict Should Not Prevail.*

It should be the first care of the court to preserve the right of jury trial as guaranteed by the Federal Constitution to every litigant. So withdrawing a case from the jury by instructing a verdict should never be done, unless the causes as set forth above are indisputably present. So the following rules in passing upon a motion to instruct a verdict should control the court:

*First.* If the plaintiff has introduced evidence bearing materially on the issues, which would be sufficient, if uncontradicted, to sustain a verdict, then no amount of contradictory evidence would justify the court in taking the case from the jury and instructing a verdict. *Rochford v. Pennsylvania Co.* 98 C. C. A. 105, 174 Fed. 81.

*Or, Second.* Where the evidence is of such a character that reasonable men would differ as to the conclusions to be drawn from it. *Louisville & N. R. Co. v. Roberts*, 101 C. C. A. 202, 177 Fed. 923, 924, and cases cited; *Columbia Box & Lumber Co. v. Drown*, 84 C. C. A. 269, 156 Fed. 459.

*Third.* The mere fact that there is a preponderance of evidence on one side or the other, in favor of the party moving for a verdict, does not require the judge to take the case from the jury, even though, it might justify a new trial because of the preponderance of evidence against the verdict. *Rochford v. Pennsylvania Co.* 98 C. C. A. 105, 174 Fed. 81; *City & Suburban R. Co. v. Svedborg*, 194 U. S. 201, 48 L. ed. 935, 24 Sup.

Ct. Rep. 656; Mt. Adams & E. P. Inclined R. Co. v. Lowery, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463; Chicago, M. & St. P. R. Co. v. Anderson, 94 C. C. A. 241, 168 Fed. 901.

*Amendment of the Verdict.*

If the verdict requires an amendment it should usually be made before the separation of the jury (Pressed Steel Car Co. v. Steel Car Forge Co. 79 C. C. A. 130, 149 Fed. 182); but it may be amended afterwards, upon the affidavit of jury, by adding interest, where the jury swear that it was their intention to find interest (Elliott v. Gilmore, 145 Fed. 965, and cases cited). So, it may be amended, both in form and substance, *during the term*, by reference to the judge's notes or other satisfactory evidence. Miller v. Steele, 82 C. C. A. 572, 153 Fed. 715-722.

Where there were several causes of action, and the jury only found on one, and were discharged, the judge refused to allow an amendment as follows: "And for the defendant on the other causes of action." Chandler v. Andrews, 192 Fed. 543.

*Judgment Non Obstante Veredicto.*

Judgment *non obstante* is generally defined as a judgment in favor of the plaintiff, notwithstanding the verdict has been returned for the defendant. German Ins. Co. v. Frederick, 7 C. C. A. 122, 19 U. S. App. 24, 58 Fed. 148. It is a procedure within section 914, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 684, and therefore controlled by the methods provided by State laws. Smith v. Jones, 104 C. C. A. 329, 181 Fed. 820-824, and cases cited; Fries-Breslin Co. v. Bergen, 99 C. C. A. 384, 176 Fed. 76, same case 168 Fed. 363; Ft. Scott v. W. G. Eads Brokerage Co. 54 C. C. A. 437, 117 Fed. 51; Carstains v. American Bonding & T. Co. 54 C. C. A. 85, 116 Fed. 449; Baltimore & O. R. Co. v. McCune, 98 C. C. A. 561, 174 Fed. 991; Troxell v. Delaware, L. & W. R. Co. 180 Fed. 871. It is equivalent to the direction of a verdict, and therefore within the province of the Federal courts to grant it. The practice has some advantages in the fact that the one trial and one final

judgment on review, in case of appeal by writ of error, settles the case, instead of reversing and sending the case back for a new trial.

As said, the laws of each State providing for the procedure must be followed, and it will be found generally that the issue is formulated as follows: Taking a case by way of illustration. Where the verdict has been found for the defendant, and counsel for plaintiff desires to raise the issue that there was no evidence to sustain it, counsel for plaintiff should, at the conclusion of the evidence and before submission to the jury, ask the court to instruct a verdict in his favor by motion; if the motion is overruled, or the case, notwithstanding the motion, is submitted by the court, and the point reserved by the court for future consideration, and the verdict is returned in favor of the defendant, he should file, within the time allowed for a motion for a new trial, a motion to have all the evidence taken in the trial certified and filed as a part of the record, and upon the record that judgment *non obstante* be entered for plaintiff. If it is intended to have the case reviewed in the event of an adverse decision, the motion, if overruled, should be excepted to and a bill of exceptions taken and on the error assigned the motion is overruled; if there be an adverse decision the exception must be taken and noted, and the bill of exceptions signed and allowed by the court, upon which his assignment of error must be based. On the error assigned the appellate court will decide whether there was evidence to go to the jury on the issues made; if not, the case will be remanded to enter judgment on the point reversed. *Smith v. Jones*, 104 C. C. A. 329, 181 Fed. 824. The ruling is not reviewable unless an exception is taken for the refusal to enter judgment *non obstante*. *Hatcher v. Northwestern Nat. Ins. Co.* 106 C. C. A. 225, 184 Fed. 24. However, in *Baltimore & O. R. Co. McCune*, 98 C. C. A. 561, 174 Fed. 992, the point was raised that there was no exception taken to the ruling of the court to enter a judgment *non obstante*, and the court refused to allow the contention, because under the statute of the State in which the case was tried the procedure required the judge to certify the evidence and grant an exception to his adverse ruling, the appellate court saying that the exception was supplied by the law, and no further exception was necessary.

The better practice out of abundant caution would be to take the exception and prepare your bill as required in other matters excepted to, with the view of having the same reviewed on a writ of error. See *American Smelting & Ref. Co. v. Karapa*, 97 C. C. A. 517, 173 Fed. 607.

*New Trial.*

By U. S. Rev. Stat. sec. 726, U. S. Comp. Stat. 1901, p. 584, it is provided that all of the courts of the United States shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law. Congress having thus legislated, the Federal courts act independently of any State statute or practice. *Duke v. St. Louis & S. F. R. Co.* 172 Fed. 684, 686, and cases cited; *Missouri P. R. Co. v. Chicago & A. R. Co.* 132 U. S. 191, 33 L. ed. 309, 10 Sup. St. Rep. 65; *Latchtimacker v. Jacksonville Towing & Wrecking Co.* 181 Fed. 276, and cases cited; *Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 372, and cases cited; *Fishburn v. Chicago, M. & St. P. R. Co.* 137 U. S. 60, 34 L. ed. 585, 11 Sup. Ct. Rep. 8, and cases cited. However, a State statute giving an absolute right to two trials, as in ejectment, is a rule of property, and Federal courts will conform to it. *Smale v. Mitchell*, 143 U. S. 108, 36 L. ed. 92, 12 Sup. Ct. Rep. 353.

*Entirely Discretionary.*

It being entirely discretionary with the court to grant a new trial *Manning v. German Ins. Co.* 46 C. C. A. 144, 107 Fed. 52; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 301, 23 L. ed. 901; *Felton v. Spiro*, 24 C. C. A. 321, 47 U. S. App. 402, 78 Fed. 576; *American Smelting & Ref. Co. v. Karapa*, 97 C. C. A. 517, 173 Fed. 609, and cases cited), therefore a refusal to grant cannot be assigned as error and is not reviewable (*Latchtimacker v. Jacksonville, Towing & Wrecking Co.* 181 Fed. 277, and cases cited; *Miller v. Steele*, 82 C. C. A. 572, 153 Fed. 715; *Tacoma R. & Power Co. v. Geiger*, 76 C. C. A. 252, 145 Fed. 504; *Fidelity & C. Co. v. Thompson*, 11 L.R.A.(N.S.)

1069, 83 C. C. A. 324, 154 Fed. 485, 12 Ann. Cas. 181; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 301, 23 L. ed. 901; O'Donnell v. New York Transp. Co. 109 C. C. A. 29, 187 Fed. 110; Bidwell v. George B. Douglas Trading Co. 105 C. C. A. 385, 183 Fed. 93; American Window Glass Co. v. Noe, 86 C. C. A. 133, 158 Fed. 777; American Bonding Co. v. Strasburger, 99 C. C. A. 622, 176 Fed. 349), unless an abuse of discretion is apparent (James v. Evans, 80 C. C. A. 240, 149 Fed. 136); as, where the verdict is inconsistent or shows an abuse of the jury's power (Pugh v. Bluff City Excursion Co. 101 C. C. A. 403, 177 Fed. 399).

So a new trial is the proper remedy where the trial judge is incapacitated to settle the bill of exceptions. Manning v. German Ins. Co. 46 C. C. A. 144, 107 Fed. 52. So, where the verdict is so excessive as to shock the sense of justice. Smith v. Pittsburgh & W. R. Co. 90 Fed. 787.

#### *New Trial Not Necessary to Appeal.*

It is not essential, to entitle a party to a review of the judgment, to have made a motion for a new trial (Aaron v. United States, 84 C. C. A. 67, 155 Fed. 833), though indispensable in the State practice where the court is sitting (Boatmen's Bank v. Trower Co. 181 Fed. 804). And when made it cannot either affect or limit the matters that may be embraced in an assignment of errors. Owen v. Giles, 85 C. C. A. 189, 157 Fed. 825.

#### *Granting a Remittitur.*

A trial court cannot arbitrarily order a remittitur; if entered it must be at the election of plaintiff to enter it or grant a new trial to the defendant. Kennon v. Gilmer, 131 U. S. 29, 33 L. ed. 113, 9 Sup. Ct. Rep. 696; Duke v. St. Louis & S. F. R. Co. 172 Fed. 687; Preble v. Bates, 39 Fed. 757. Nor can the appellate court reduce an excessive verdict, but may order a new trial unless plaintiff remits the excess. Kennon v. Gilmer, 131 U. S. 29, 33 L. ed. 113; Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner), 147 U. S. 590, 37 L. ed. 292, 13 Sup. Ct. Rep. 557; Chicago, B. & Q. R. Co. v.

Upton, 194 Fed. 371; Joplin & P. R. Co. v. Payne, 194 Fed. 387. The appellate courts will not reverse if a proper computation can be made for remitting the excess, and the defendant in error will file a remittitur. Van Boskerck v. Trobert, 107 C. C. A. 383, 184 Fed. 422, citing Hansen v. Boyd, 161 U. S. 397, 40 L. ed. 746, 16 Sup. Ct. Rep. 571.

## CHAPTER XVII.

### JUDGMENTS.

In *Knight v. Illinois C. R. Co.* 103 C. C. A. 514, 180 Fed. 372, it is said that section 914, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 684, applies to the mode of entering and recording judgments, including provisions for entering judgments against one or more defendants in the suit,—citing *Sawin v. Kenny*, 93 U. S. 289, 23 L. ed. 926. By act of August, 1888, 25 Stat. at L. 357, chap. 729, sec. 2, U. S. Comp. Stat. 1901, p. 701, the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices, direct and cross, of the judgment records of said courts, which shall be at all times open to the inspection of the public. (See *Liens of Judgments*.)

Judgments will not be reversed for the want of form, or for defects. U. S. Rev. Stat. sec. 954, U. S. Comp. Stat. 1901, p. 696.

#### *Judgments by Default.*

The United States courts may prescribe their own rules for taking and entering judgments by default. U. S. Rev. Stat. sec. 918, U. S. Comp. Stat. 1901, p. 685.

#### *Amending Judgments.*

The courts can amend any defect or want of form in a judgment. Sec. 954, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 696.

#### *Interest on.*

By U. S. Rev. Stat. sec. 966, U. S. Comp. Stat. 1901, p. 700, interest is allowed on all judgments, and may be levied under process by execution issued thereon in all cases whereby the

law of the State interest may be assessed and collected under process by execution, and it shall be calculated from the date of the judgment at such rate as is allowed by law on judgments recovered in the State. *Texas & P. R. Co. v. Anderson*, 149 U. S. 242, 37 L. ed. 719, 13 Sup. Ct. Rep. 843.

#### *Setting Aside During Term.*

The trial court may amend, modify, or set aside its judgment during the term in which it is entered. This power is inherent, and settled beyond controversy. *Southern P. R. Co. v. Kelley*, 109 C. C. A. 657, 187 Fed. 939, and cases cited.

#### *Setting Aside After the Term.*

It is equally well settled that a court of law cannot change or modify substantially its judgment after the term has expired, or set it aside, whatever may be the State law or practice (*Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *Phillips v. Negley*, 117 U. S. 665, 29 L. ed. 1013; *Taylor v. Easton*, 103 C. C. A. 509, 180 Fed. 368; *Klever v. Seawall*, 12 C. C. A. 653, 22 U. S. App. 458, 65 Fed. 378, see *Travelers' Protective Asso. v. Gilbert*, 55 L.R.A. 538, 49 C. C. A. 309, 111 Fed. 276), except in cases when a writ of error coram nobis is applicable at common law (*Phillips v. Negley*, *supra*; *Hickman v. Ft. Scott*, 141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9); but equity will relieve when the law cannot, when there is fraud or imperative equitable grounds (see *Johnson v. Waters*, 111 U. S. 667, 28 L. ed. 556, 4 Sup. Ct. Rep. 619; *Arrowsmith v. Gleason*, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; *Platt v. Threadgild*, 80 Fed. 194).

#### *Judgments Nunc Pro Tunc.*

The entering of judgment *nunc pro tunc* is usually controlled by the rules of the trial court. The granting of the motion is discretionary, and refusal is consequently not appealable.

Where the clerk neglected to enter a judgment pursuant to the order of the court, it could not be entered *nunc pro tunc* after

the term. *Pressed Steel Car Co. v. Steel Car Forge Co.* 79 C. C. A. 130, 149 Fed. 182.

### *Revival of Judgments.*

Where a judgment becomes "dormant," it must be revived before execution can issue. *King v. Davis*, 137 Fed. 204. See *General Electric Co. v. Hurd*, 171 Fed. 984. And the procedure by sci. fa. may conform to the State practice where there is no rule by the trial court governing the procedure. *King v. Davis*, *supra*; *Egan v. Chicago G. W. R. Co.* 163 Fed. 345. See *Green v. Barrett*, 123 Fed. 349, where the right of revival as to suits against executors (U. S. Rev. Stat. section 944) may be controlled by State laws.

The revival of judgments is based on the power of the court to control its judgments until satisfied, which includes the power to issue writs to revive it and prescribe the method of service of such writs. *Collin County Nat. Bank v. Hughes*, 81 C. C. A. 556, 152 Fed. 414, same case 83 C. C. A. 661, 155 Fed. 390. This power cannot be impaired by State legislation. 152 Fed. p. 415, and cases cited. The proceeding to revive is but the continuance of the suit, and a supplementary remedy to enforce the judgment. 152 Fed. 415, U. S. Rev. Stat. sec. 716, U. S. Comp. Stat. 1901, p. 580. *Lafayette County v. Wonderly*, 34 C. C. A. 360, 92 Fed. 313; *United States v. Payne*, 147 U. S. 687, 37 L. ed. 332, 13 Sup. Ct. Rep. 442; *Insley v. United States*, 150 U. S. 512, 37 L. ed. 1163, 14 Sup. Ct. Rep. 158.

### *Summary Judgments.*

Where the statutes of the State authorize a summary judgment against sureties on bonds, the Federal courts will enter the same judgments under like conditions. *Egan v. Chicago G. W. R. Co.* 163 Fed. 344.

### *Limitation to Judgments.*

The laws of limitation of the State in which the judgment is entered apply. *Metcalf v. Watertown*, 153 U. S. 671, 38 L. ed.

861, 14 Sup. Ct. Rep. 947; General Electric Co. v. Hurd, 171 Fed. 984.

*Agreed Judgment.*

A judgment entered by consent is not appealable. Ballot v. United States, 96 C. C. A. 360, 171 Fed. 404.

*Enforcement of Judgments.*

By sec. 916, U. S. Comp. Stat. 1901, p. 684, a party recovering a judgment in a common-law cause in a Federal court is entitled to similar remedies, by execution or otherwise, as are now provided in like causes by the laws of the State in which the court is held, or by laws of the State hereinafter enacted which may be adopted by rules of the court; and the Federal courts are authorized by general rule to adopt such State laws as may hereafter be in force in relation to remedies upon judgments. See Kaill v. St. Landry Parish, 194 Fed. 73-76, and cases cited (see Executions).

*Liens of Judgments*

The act of August 1, 1888, amended by act of March 2, 1895, regulating the lien of judgments, prescribes that judgments and decrees rendered in the district courts of the United States within any State shall be liens on property throughout such State, in the same manner and to the same extent and under the same conditions only as if such judgment had been rendered by a court of general jurisdiction of such State; Provided, that whenever the laws of any State require a judgment of a State court to be registered, recorded, docketed, and indexed, or any other thing to be done in a particular manner or in a certain office or county or parish of Louisiana, before a lien shall attach, this act shall be applicable therein, and only when the laws of such State shall authorize judgments of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments of the courts of the States.

Sec. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross indices of the judgment records of said courts; and such indices and records shall be at all times open to the examination and inspection of the public.

Sec. 3. That nothing herein contained shall be construed to require the docketing of a judgment of a United States court, as the filing of a transcript thereof, in any State office within the same county or parish of Louisiana in which the judgment is rendered, in order that such judgment shall be a lien on any property within such county, if the clerk of the United States court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish.

*When Judgments Cease to be Liens.*

By section 967, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 700, judgments cease to be liens, within any State, on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease by law to be liens thereon. It will be seen by the above acts that the judgments of the courts of the United States and the liens acquired by them must conform to State laws which give to their judgments the force of liens on real property. See General Electric Co. v. Hurd, 171 Fed. 984; Cooke v. Avery, 147 U. S. 387, 37 L. ed. 213, 13 Sup. Ct. Rep. 340.

*Execution.*

By sec. 916, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 684, it is provided that a party recovering a judgment in any common-law cause in any circuit or district court of the United States shall be entitled to similar remedies on the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may from time to time by general rules

adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

It will be noticed that only the laws relating to executions and other remedies for the enforcement of judgments existing in the States in which such judgments were rendered, at the time this act was passed (June, 1872), are adopted by this section, but authority is given to adopt by general rule any subsequent legislation of the States providing for the enforcement of the judgments entered in their courts. So then, if the Federal courts have not adopted by rule the legislation of the States for the enforcement of their judgments enacted since 1872, they will be controlled by legislation as it existed in 1872 in States organized prior to that year. See *General Electric Co. v. Hurd*, 171 Fed. 986, and cases cited; *Meyer v. Consolidated Ice Co.* 163 Fed. 403; *Kaill v. St. Landry Parish*, 194 Fed. 73-76, and cases cited. Where State provides for proceedings preliminary to issuing execution, such as examining a judgment defendant, the Federal courts will enforce the same. *Meyer v. Consolidated Ice Co.* 163 Fed. 400.

By sec. 985, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 707, it is provided that execution upon judgments or decrees obtained in the circuit or district courts of the United States, in any State which is divided into two or more districts, may run and be executed in any part of such State, but shall be issued from, and made returnable to, the court wherein the judgment was obtained.

*Return on Execution.*

A sheriff's return on an execution should consist of a concise statement of the facts, showing what he has done in pursuance of his authority, and not a mere conclusion of law that the execution has been satisfied. *Cambers v. First Nat. Bank*, 144 Fed. 718.

*Sale of Land Under Execution.*

By act of March 3, 1893, 27 Stat. at L. 751, chap. 225, U. S. Comp. Stat. 1901, p. 710, it is provided that all real estate or any

interest therein, sold under any order or decree of the United States courts, shall be sold at public sale at the court house of the county, city, or parish in which the property or a greater part thereof is situated, or upon the premises, as the court rendering such order or decree may elect. The act is mandatory, and no discretion is left with the court to order a sale otherwise than in the manner set forth in the statute. *Cumberland Lumber Co. v. Tunis Lumber Co.* 96 C. C. A. 244, 171 Fed. 352.

*Publication of Notice of Sale.*

That hereafter no sale of real estate on an order, judgment, or decree of a Federal court shall be had without previous publication of notices of such proposed sale once a week for at least four weeks prior to such sale, in at least one newspaper printed, regularly issued, and having a general circulation in the county and State where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or State, such notice shall be published in such of the counties where said property is situated as the court may direct. Such notice shall, among other things, describe the property to be sold.

The court may direct the notice of sale to be published in such other papers as he may deem necessary. The statute is mandatory, and a sale otherwise made is void. *Cumberland Lumber Co. v. Tunis Lumber Co.* supra; *Nevada Nickel Syndicate v. National Nickel Co.* 103 Fed. 391.

By sec. 994, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 711, when a marshal dies or the term of his commission expires after he has taken in execution any lands, tenements, or hereditaments, and before sale or any final disposition thereof, the like process shall issue to the succeeding marshal, and the same proceeding shall be had as if such marshal had not died or been removed, or the term of his commission had not expired. And if a marshal has died, been removed, or the term of his office has expired after he has sold any lands, etc., under the process of the court and before a deed is executed to the purchaser, such court may, on application of the purchaser or by plaintiff in

the suit, setting forth the reasons therefor, order the marshal for the time being to perfect the title and execute the deed to the purchaser on his paying the purchase money and costs remaining unpaid.

*Sale of Personal Property under Execution.*

Section 2 of the act of March 3, 1893, provides that all personal property shall be sold under a judgment or decree of a United States court at the court house of the county, parish, or city in which the property is situated, or upon the premises where located, as the court may direct. There is no provision in the act for advertising the sale of personal property to be sold under execution, so a sale made under the local laws of advertisement, or as may be ordered by the court, would be sufficient. *Cumberland Lumber Co. v. Tunis Lumber Co.* 96 C. C. A. 244, 171 Fed. 356.

*Stay of Execution.*

By sec. 987, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 708, after entering judgment either upon a verdict, or finding of facts by the court, execution on motion of either party may be stayed at the discretion of the court, and on such conditions as to the security of the adverse party as the court may deem proper, for forty-two days from the date of entering the judgment, to give time for filing a motion for a new trial. If the petition is filed within forty-two days, as aforesaid, for a new trial, with a certificate of the judge of the court that he allows it to be filed, execution shall be stayed to the next session of the court, when, if a new trial is granted, the judgment will be void. *Cambuston v. United States*, 95 U. S. 285, 24 L. ed. 448.

This section does not limit the time within which motions for new trials may otherwise be filed. *Felton v. Spiro*, 24 C. C. A. 321, 47 U. S. App. 402, 78 Fed. 581. New trials must be applied for before the term ends. *Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. ed. 797, 799; *Manning v. German Ins. Co.* 46 C. C. A. 144, 107 Fed. 54, and cases cited.

By sec. 988, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p.

708, if in any State judgments are liens on the property of any defendant, and by the laws of such State defendants are entitled to stay an execution for one term or more, the defendants in an action in the Federal courts will be entitled to a stay of execution for one term. In construing this section it is said in *The Island Queen*, 152 Fed. 470, that where in the States the judgment is only a lien upon real estate, a judgment defendant in such state would not be entitled to a stay if he had no real estate.

It will be further seen that by section 988, above set forth, the Federal courts can only grant a stay of execution for one term, whatever may be the length of the stay authorized by the State courts and laws. *Petrified Bone Min. Co. v. Rogers*, 159 Fed. 1019.

A judgment with stay is not final, so that a writ of error may be sued out. *Kingman & Co. v. Western Mfg. Co.* 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786.

#### *Effect of Levyng.*

Property levied upon is *in custodia legis*, and no other court can by any other process interfere with such custody. *Lewis v. Dillard*, 22 C. C. A. 488, 40 U. S. App. 404, 76 Fed. 688; *American Asso. v. Hurst*, 7 C. C. A. 598, 16 U. S. App. 325, 59 Fed. 1. So, no remedy of an injunctive or dispossessory character can disturb the effectiveness of process of courts of concurrent jurisdiction, and the same rule applies when property has been attached. *Ibid*; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Southern Bank & T. Co. v. Folsom*, 21 C. C. A. 568, 43 U. S. App. 713, 75 Fed. 932; *Summers v. White*, 17 C. C. A. 631, 36 U. S. App. 395, 71 Fed. 106; *Rio Grande R. Co. v. Gomila* (*Rio Grande R. Co. v. Vinet*) 132 U. S. 478, 33 L. ed. 400, 10 Sup. Ct. Rep. 155; *Security Trust Co. v. Union Trust Co.* 134 Fed. 302; *Central Nat. Bank v. Stevens*, 169 U. S. 460, 42 L. ed. 817, 18 Sup. Ct. Rep. 403; *Leathe v. Thomas*, 38 C. C. A. 75, 97 Fed. 139; *Texas Products Cotton Co. v. Starnes*, 128 Fed. 184; *Union P. R. Co. v. Flynn*, 180 Fed. 569; *National Surety Co. v. State Bank*, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 601. However, the custody of one court

does not prevent garnishment process covering the excess, but the court having the custody should determine priorities as to the surplus. Gumbel v. Pitkin, 124 U. S. 132, 31 L. ed. 374, 8 Sup. Ct. Rep. 379.

So, where the laws of a State permit either in the levy of an execution or the attachment of property other claimants or creditors to intervene, to secure a proper distribution of the excess value, the same proceeding may be had in the Federal courts. Krippendorf v. Hyde, 110 U. S. 276-284, 28 L. ed. 145-148, 4 Sup. Ct. Rep. 27; Gumbel v. Pitkin, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; Columbus, S. & H. R. Co's Appeal, 48 C. C. A. 275, 109 Fed. 199; The Daniel Kaine, 35 Fed. 788, 789.

So the marshal may be charged as garnishee when the levy was invalid. *Ibid.*

#### *The Lien of the Execution on Personal Property.*

In some States the lien is only created with the levy; in others the lien is created when issued. The Federal courts conform to the State law. The Daniel Kaine, 35 Fed. 788, 789.

#### *Appraising Goods Levied upon.*

By sec. 993, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 709, where it is required by a State law that goods seized under execution shall be appraised before the sale, appraisers appointed under the authority of the State may appraise goods taken under execution from a Federal court in the same manner. The marshal shall summon the appraisers in the same manner as the sheriff is required to do by the laws of the State; but if the appraisers summoned fail to appear, the marshal may sell without an appraisement.

## CHAPTER XVIII.

### ATTACHMENTS AND GARNISHMENT.

By sec. 915, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 684, the plaintiff in common-law causes is entitled to the same remedies by attachment or other process against the property of the defendant as are now (act June 1, 1872) provided by the laws of the State in which the court is held. And Federal courts may from time to time by general rules adopt such State laws as may be in force in relation to attachments and other process in the States in which the court is held: Provided, that similar affidavits or proof, and similar securities as required by State laws shall be first furnished by the party seeking the attachment. *Citizens' Bank v. Farwell*, 6 C. C. A. 24, 12 U. S. App. 409, 56 Fed. 570. We see, then, the State laws control the Federal courts in issuing attachments, which existed in 1872, or State laws enacted since then and adopted by the Federal courts by rule. The remedy should be further applied in accordance with the construction placed upon State laws by State decisions. *Third Nat. Bank v. Teal*, 4 Hughes, 572, 5 Fed. 503. See *Mather v. Nesbit*, 4 McCrary, 505, 13 Fed. 872; *Bates v. Days*, 5 McCrary, 342, 17 Fed. 167; *Crary v. Dye*, 208 U. S. 516, 52 L. ed. 597, 28 Sup. Ct. Rep. 360; *Gumbel v. Pitkin*, 124 U. S. 132, 31 L. ed. 374, 8 Sup. Ct. Rep. 379.

The adoption of the rule need not be in writing; a uniform practice becomes an established rule, and the presumption of adoption prevails. *Citizens' Bank v. Farwell*, 6 C. C. A. 30, 12 U. S. App. 419, 56 Fed. 570; *Logan v. Goodwin*, 43 C. C. A. 658, 104 Fed. 490.

### *Causes of Action.*

Causes of action on which the attachment is based follow the State laws in which the court issuing the attachment is sitting. *Seeley v. Missouri, K. & T. R. Co.* 39 Fed. 253; *Rothschild v. Knight*, 184 U. S. 334, 46 L. ed. 573, 22 Sup. Ct. Rep. 391;

Auerbach v. Internationale Wolfram Lampen Aktien Gesellschaft, 177 Fed. 458, 461. In matters of attachment the Federal and State courts are courts of co-ordinate jurisdiction, administering the State laws. Brooks v. Fry, 45 Fed. 776.

*Affidavits for Attachment.*

They must show one or more of the grounds authorized by State statutes, and must be made by one authorized by the State statute to make them. Johnson v. Johnson, 31 Fed. 700; Société Foncière v. Milliken, 135 U. S. 304, 34 L. ed. 208, 10 Sup. Ct. Rep. 823; Glidden v. Whittier, 46 Fed. 437; Bigelow v. Chatterton, 2 C. C. A. 402, 10 U. S. App. 267, 51 Fed. 614. But the proof of all the grounds stated may not be necessary. Strauss v. Abrahams, 32 Fed. 310.

*Affidavit may be Amended.*

Though the State practice does not allow an amendment, the Federal courts permit it under section 948, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 695, authorizing the amendment of any process before them, or returnable to them, but with the modification that the defect and amendment thereof will not injure or prejudice the other party. Wolf v. Cook, 40 Fed. 432; Booth v. Denike, 65 Fed. 47; Erstein v. Rothschild, 22 Fed. 61.

And under any of the conditions permitted by State laws authorizing amendments, the Federal courts will follow them. Salmon v. Mills, 1 C. C. A. 278, 4 U. S. App. 101, 49 Fed. 333; Fleischner v. Pacific Postal Teleg. Cable Co. 55 Fed. 739; Rothschild v. Knight, 184 U. S. 334, 46 L. ed. 573, 22 Sup. Ct. Rep. 391; Fitzpatrick v. Flannagan, 106 U. S. 648, 27 L. ed. 211, 1 Sup. Ct. Rep. 369. For example, you may amend any procedure in attachments, as defect in proof of summons, by publication, even after judgment (Bigelow v. Chatterton, 2 C. C. A. 402, 10 U. S. App. 267, 51 Fed. 614-620), where the State laws permit amendments *nunc pro tunc*.

*The Bond.*

The bond must be in amount required by the State law. Blue Grass Canning Co. v. Stewart, 99 C. C. A. 159, 175 Fed. 538-541; Fleitas v. Cockrem, 101 U. S. 301, 25 L. ed. 954. Construction of, follows State laws. Fidelity & D. Co. v. L. Bucki & Son Lumber Co. 189 U. S. 135, 47 L. ed. 744, 23 Sup. Ct. Rep. 582. The bond may be amended under the Federal law. Bumberger v. Gerson, 24 Fed. 257.

*The Writ of Attachment and Lien.*

The form and issuing the writ conforms to the State practice, but an amendment of the writ and petition increasing the amount was held not to dissolve the attachment. Cutler v. Lang, 30 Fed. 173.

*The Lien.*

The lien is created by the levy, and when personal property is attached it must be taken into custody by the marshal. Adler v. Roth, 5 Fed. 895; Coulson v. Penhandle Nat. Bank, 4 C. C. A. 616, 13 U. S. App. 39, 54 Fed. 855, 858. See Dudley v. Lamoille County Nat. Bank, 14 Fed. 217; Richmond v. Brookings, 48 Fed. 241; People's Sav. Bank & T. Co. v. Batchelder Egg Case Co. 2 C. C. A. 126, 4 U. S. App. 603, 51 Fed. 131-137. But it is governed by State laws. Hankinson v. Page, 31 Fed. 184.

*Property Subject to the Attachment.*

The property subject to levy is controlled by State laws (Thompson v. Baker, 141 U. S. 648, 35 L. ed. 889, 12 Sup. Ct. Rep. 89; Coulson v. Penhandle Nat. Bank, 4 C. C. A. 616, 13 U. S. App. 39, 54 Fed. 858; Bigelow v. Chatterton, 2 C. C. A. 402, 10 U. S. App. 267, 51 Fed. 614; Richmond v. Brookings, 48 Fed. 241; Montgomery v. McDermott, 43 C. C. A. 348, 103 Fed. 801; Simonds v. Pearce, 31 Fed. 137; Hankinson v. Page, 31 Fed. 185); does not reach exemptions, though property

fraudulently conveyed (*Naumberg v. Hyatt*, 24 Fed. 898); and not property of an equitable nature (*Shiel v. Patrick*, 8 C. C. A. 440, 20 U. S. App. 407, 59 Fed. 992); nor when *in custodia legis* (*Corbitt v. Farmers' Bank*, 114 Fed. 602; *Henry v. Gold Park Min. Co.* 5 McCrary, 70, 15 Fed. 649), as money in hands of marshal (*Clarke v. Shaw*, 28 Fed. 356).

*Cannot Issue against National Bank.*

U. S. Rev. Stat. sec. 242, U. S. Comp. Stat. 1901, p. 3517, forbids the issue of an attachment, execution, or injunction against a national bank before judgment. *Pacific Nat. Bank v. Mixter*, 124 U. S. 726, 727, 31 L. ed. 570, 571, 8 Sup. Ct. Rep. 718; *Garner v. Second Nat. Bank*, 66 Fed. 371.

*Service of the Writ.*

All requirements of the State law should be followed.

*Return of the Writ.*

State laws will control where no prejudice will result (*Mays v. Newlin*, 143 Fed. 574); but the time in which the writ is to be returned under State laws will not be followed when it may unduly burden the administration of justice in the Federal courts (*Gokey v. Boston & M. R. Co.* 130 Fed. 993).

*Sufficiency of the Return.*

While acts and steps taken in levying the writ according to the laws of the State should be stated, yet if not stated, it will be presumed that the marshal followed the requirements of the laws. *Griffin v. American Gold Min. Co.* 68 C. C. A. 637, 136 Fed. 69.

*Conflicting Attachments and Priorities.*

The court from which the attachment issues which is first levied acquires jurisdiction over the property attached (*Adler*

v. Roth, 5 Fed. 895); but this does not prevent the levy of other attachments issuing out of the same court, or the constructive levies of attachments issuing out of other courts, State or Federal (Bates v. Days, 5 McCrary, 342, 17 Fed. 167; Brooks v. Fry, 45 Fed. 776; Naumburg v. Hyatt, 24 Fed. 898).

The court having jurisdiction of the attached property or the proceeds if ordered sold may, without reference to citizenship of parties, entertain interventions and determine priorities in distributing the fund. Gumbel v. Pitkin, 124 U. S. 132, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; Fountain v. 624 Pieces of Timber, 140 Fed. 381; Hatcher v. Hendrie & B. Mfg. & Supply Co. 68 C. C. A. 19, 133 Fed. 267; Central Trust Co. v. Worcester Cycle Mfg. Co. 128 Fed. 483; see Re John L. Nelson & Bro. Co. 149 Fed. 594; Dooley v. Hadden, 179 U. S. 646, 45 L. ed. 357, 21 Sup. Ct. Rep. 259; Watson v. Bonfils, 53 C. C. A. 535, 116 Fed. 157.

Where conflicting attachments come up by removal from the State courts, the Federal court will distribute the fund in the same way as would have been done by the State court. Bankers' & M. Teleg. Co. v. Chicago Carpet Co. 28 Fed. 398.

#### *Dissolution of the Attachment.*

By section 933, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 689, attachments shall be dissolved when any contingency occurs under which, according to the laws of the State in which the court is held, such attachments would be dissolved on like process instituted in the courts of the State. But nothing shall interfere with any priority of the United States on the payment of debts. Neufeld v. Neufeld, 37 Fed. 560; Schwartz v. H. B. Claffin Co. 9 C. C. A. 204, 13 U. S. App. 707, 60 Fed. 676; Central Trust Co. v. Worcester Cycle Mfg. Co. 114 Fed. 659; Salmon v. Mills, 1 C. C. A. 278, 4 U. S. App. 101, 49 Fed. 333.

We have seen that the grounds and procedure for dissolution are controlled by State laws. Blount v. American Lead & Baryta Co. 88 C. C. A. 574, 161 Fed. 714; Glidden v. Whittier, 46 Fed. 437; Lafollye v. Carriere, 24 Fed. 346; Feurer v. Stewart, 82 Fed. 294; Jenks v. Richardson, 71 Fed. 365.

Amendment of the writ and petition, increasing amount, does not dissolve the attachment. *Cutler v. Lang*, 30 Fed. 173.

*You Cannot Appeal from Interlocutory Order of Dissolution.*

Though permitted by State law, you cannot appeal from interlocutory order of dissolution. *Logan v. Goodwin*, 43 C. C. A. 658, 104 Fed. 490.

*Delivery Bond.*

Many States provide for the return of the property attached to the defendant in execution upon a delivery bond being executed and delivered to the marshal in lieu of the property, which is recognized and followed, as a part of the procedure in attachments, by the Federal courts. *Ebner v. Heid*, 60 C. C. A. 370, 125 Fed. 680. Destruction of property no defense to the bond. *Doggett, B. & H. Co. v. Black*, 40 Fed. 439. In some states it is held that it does not discharge the lien of the attachment. *Re Windt*, 177 Fed. 584. It is, however, generally held as a discharge of the attachment. *Ebner v. Heid*, *supra*. In some States it is held that the delivery bond could not be given where the attached property is current money. *United States v. Neely*, 154 Fed. 496. Of course if attachment is illegal the delivery bond is released. *Pacific Nat. Bank v. Mixter*, 124 U. S. 728, 729, 31 L. ed. 571, 572, 8 Sup. Ct. Rep. 718, reversing 22 Fed. 694.

*Claim by Third Persons to the Property Attached.*

Where the State provides for a claim by third persons of the property attached, and the proceedings to determine the right of the claimant, as making an affidavit of ownership and title and giving bond, which is the usual procedure, the Federal courts follow the State practice. See *Marden v. Starr*, 107 Fed. 199; *Batavia v. Wallace*, 42 C. C. A. 310, 102 Fed. 240. If after filing the claim bond and affidavit the plaintiff in attachment fails to have an issue made on the affidavit of claim within a certain time provided by State laws in which the court is

held, the claimant is entitled to an order discharging the attachment as to the property claimed. *Tennent-Stribling Shoe Co. v. Roper*, 62 C. C. A. 548, 128 Fed. 40.

A third person claiming ownership of a fund in bank attached as the property of defendant may assert his claim by motion to vacate the attachment. *United States v. Neeley*, 146 Fed. 763, 764.

#### *Suing on Bond.*

A judgment in favor of the defendant in attachment is conclusive as to the wrongful issue of the attachment, and the right to sue for damages on the bond. *Anvil Gold Min. Co. v. Hoxie*, 60 C. C. A. 492, 125 Fed. 724. But the method of recovering damages by reason of wrongfully suing out an attachment is controlled by local law, which the Federal courts must follow. *Perez v. Fernandez*, 202 U. S. 80-98, 50 L. ed. 942-948, 26 Sup. Ct. Rep. 561; *Bates v. Days*, 5 McCrary, 342, 17 Fed. 167. No damages can be recovered against sureties on the bond not incident to the attachment. *Johnston v. Sexton*, 86 C. C. A. 260, 159 Fed. 70. Where the bond was given to a receiver of a corporation, the corporation may sue upon the same after the discharge of the receiver. *American Surety Co. v. Campbell & Z. Co.* 71 C. C. A. 55, 138 Fed. 531. If the attachment is wrongfully sued out, the giving of a delivery bond was held not to prevent suit on the attachment bond. *Anvil Gold Min. Co. v. Hoxie*, 60 C. C. A. 492, 125 Fed. 724. The jurisdiction to sue on the bond rests upon the jurisdiction in the original suit. *Files v. Davis*, 118 Fed. 465.

#### *Jurisdiction by Attachment.*

We have already seen that common-law actions can only be brought in the United States courts in the district in which the defendant is an inhabitant or found therein, or he voluntarily appears, where the suit is of a personal and not local nature. So in such actions personal service is indispensable to acquiring jurisdiction. An attachment, being only an incident of the suit (*Laborde v. Ubarri*, 214 U. S. 173, 53 L. ed. 955, 29 Sup. Ct. S. S. at L.-10).

Rep. 552; *Ex parte Des Moines & M. R. Co.* 103 U. S. 794, 26 L. ed. 461), cannot take the place of the personal service required by the Federal law (*United States v. Brooke*, 184 Fed. 342; *Central Trust Co. v. Chattanooga, R. & C. R. Co.* 68 Fed. 685; *Boston Electric Co. v. Electric Gas Lighting Co.* 23 Fed. 838; *Harland v. United Lines Teleg. Co.* 6 L.R.A. 252, 40 Fed. 308; *Erstein v. Rothschild*, 22 Fed. 61). However, where a State court acquires by its laws jurisdiction by attachment, and the cause is removed to the Federal court, the Federal court will recognize the validity of the State jurisdiction, and will retain the case for adjudication. *Wells v. Clark*, 136 Fed. 465, and cases cited; *Crocker Nat. Bank v. Pagenstecher*, 44 Fed. 705; *Richmond v. Brookings*, 48 Fed. 241. See *Flint v. Coffin*, 100 C. C. A. 342, 176 Fed. 872, and *Lackett v. Rumbaugh*, 45 Fed. 23. But when removed, the defendant may move for the abatement of the attachment in the Federal court if improvidently issued on any cause for abatement recognized by the State laws. *Flint v. Coffin*, 100 C. C. A. 342, 176 Fed. 872; *Corbitt v. Farmers' Bank*, 114 Fed. 603, and cases cited; *Davis v. Cleveland, C. C. & St. L. R. Co.* 146 Fed. 403, 404.

#### *Garnishment.*

Section 915, U. S. Comp. Stat. 1901, p. 684, above set forth, gives authority to Federal courts to issue writs of garnishment under State laws existing in June, 1872, when the section was passed, and to adopt by rule any subsequent State legislation in relation to the issue of the writ and the procedure necessary. *Randolph v. Tandy*, 39 C. C. A. 351, 98 Fed. 939; *Wile v. Cohn*, 63 Fed. 759; *Tootle v. Coleman*, 57 L.R.A. 120, 46 C. C. A. 132, 107 Fed. 41; *First Nat. Bank v. Brainerd*, 28 Fed. 917.

#### *Issues Raised by the Garnishee.*

The methods of raising issues in the garnishment proceeding are governed by State laws and decisions; and the garnishee may set up any defense that he may have against the party to whom he is indebted if sued by him. *Schuler v. Israel*, 120 U. S. 506,

30 L. ed. 707, 7 Sup. Ct. Rep. 648; Fidelity Trust Co. v. New York Finance Co. 60 C. C. A. 189, 125 Fed. 275; Hatcher v. Hendrie & B. M. Mfg. & Supply Co. 68 C. C. A. 19, 133 Fed. 267; Daugherty v. Bogy, 44 C. C. A. 266, 104 Fed. 938. See Logan v. Goodwin, 41 C. C. A. 573, 101 Fed. 654, same case 43 C. C. A. 658, 104 Fed. 490. The practice is governed by State laws except as to the appeal from the garnishment judgment.

#### *Effect of Garnishment.*

The effect is to place the garnishee in the same relation to the attaching creditor as previously occupied by the judgment debtor. Fidelity Trust Co. v. New York Finance Co. 60 C. C. A. 189, 125 Fed. 275; Allen v. Aetna L. Ins. Co. 7 L.R.A.(N.S.) 958, 76 C. C. A. 265, 145 Fed. 881. See Wabash R. Co. v. Tourville, 179 U. S. 326, 327, 45 L. ed. 213, 214, 21 Sup. Ct. Rep. 113. The invariable rule is that a garnishee cannot be placed in a worse position by the writ than he would be if the defendant was enforcing the claim against him.

#### *Persons and Property Subject to Garnishment.*

As to who may be garnisheed, and the nature of the debt or property held by the garnishee that would be bound by the writ, is controlled by State laws. Moscow Hardware Co. v. Colson, 158 Fed. 199, 201; Johnson v. Union P. R. Co. 145 Fed. 249; See Davis v. Cleveland, C. C. & St. L. R. Co. 146 Fed. 404, 413; Telles v. Lynde, 47 Fed. 912; Younkin v. Collier, 47 Fed. 571; Gundry v. Reakirt, 173 Fed. 167; Re Hollander, 181 Fed. 1019, 1020, and cases cited; Treusch v. Ottenburg, 4 C. C. A. 629, 6 U. S. App. 403, 54 Fed. 867; Maish v. Bird, 48 Fed. 607. A judgment of one court cannot be garnisheed by process from another court. Henry v. Gold Park Min. Co. 5 McCrary, 70, 15 Fed. 649.

#### *The Debt Need Not be Due.*

Whether the indebtedness of the garnishee to the defendant

be due or not, it is subject to garnishment. *Smith v. Marker*, 85 C. C. A. 372, 154 Fed. 838. It must, however, be owing absolutely and resting upon no conditions or contingencies. *Ibid.*

*Judgment against Garnishee.*

Whether the debt be admitted by the garnishee or proven upon an issue made by him, a judgment should be entered against him, to protect him from a subsequent suit by the defendant. But no judgment can be entered against the garnishee until judgment has been entered in the suit against the defendant. Where the garnishee admits the indebtedness, or that he is not indebted, and it is so proven, he is entitled to judgment for reasonable attorneys' fees. *New York Finance Co. v. Potter*, 126 Fed. 432. However, this is controlled by the State laws. He may recover costs. *Rome R. Co. v. Richmond & D. R. Co.* 60 Fed. 43.

Where the garnishee has property in his hands belonging to the defendant, and gives up the property to an officer of the court authorized to receive it, no judgment against the garnishee is necessary to perfect the lien of the attaching creditor, but it may be sold by order of the court, and the proceeds appropriated to the debt. *Hatcher v. Hendrie & B. Mfg. & Supply Co.* 68 C. C. A. 19, 133 Fed. 267. This is also controlled by State statutes. See *Allen-West Commission Co. v. Grumbles*, 63 C. C. A. 401, 129 Fed. 288.

By the Codes of some of the States a debt due to the defendant may be attached, but judgment cannot be entered as in a garnishment, against the attached debtor, but a suit must be filed against him to enforce the lien. *Brandenstein v. Helvetia F. Ins. Co.* 159 Fed. 589, same case 92 C. C. A. 614, 168 Fed. 1020. See *United States v. Neeley*, 146 Fed. 763. See also *Third Nat. Bank v. Atlantic City*, 65 C. C. A. 157, 130 Fed. 751.

There are other sections of the United States Revised Statutes providing for garnishment in special cases. Thus, section 935, U. S. Comp. Stat. 1901, p. 689, provides for garnishment process in cases where the United States sues a corporation on a bill or note or other security; provides for summoning the debt-

ors of the corporation as garnishees; their duty to appear; and the entry of judgment for the sum admitted or proved, but not until judgment has been first obtained against the defendant in the main suit. Section 936 of the same act provides for the trial of the issues made by the answer of the garnishee, when he denies owing the defendant anything; and for the entry of judgment on a verdict against the garnishee.

*Bonds Payable to the United States.*

U. S. Rev. Stat. sec. 961, provides for entry of judgment by the United States on bonds when judgment is taken by default or confession or on demurrer.

## CHAPTER XIX.

### REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS.

The removal act embodied in U. S. Rev. Stat. sec. 629, U. S. Comp. Stat. 1901, p. 509, has been repealed by the New Judicial Code that went into effect January 1, 1912, and the law now controlling the removal of causes from the State to Federal courts has been re-enacted with some changes, and will be found in chapter 3 of the New Judicial Code, sections 28 to 39. Section 28 provides for any suit arising under the laws or Constitution of the United States, or treaties made or which shall be made under their authority, of which the district courts are given original jurisdiction, as embodied in section 24 of the New Code, which are now pending or which hereafter may be brought in a State court, may be removed by the defendant or defendants to the district court of the United States for the proper district. Any other suit of a civil nature at law or in equity, of which the district courts of the United States are given jurisdiction under section 24 of the New Code, now pending or which hereafter may be brought in any State court, may be removed by the defendant or defendants therein being *non-residents* of the State in which the suit is brought, into the district court of the United States for the proper district.

Again, where in any suit, as above stated, brought in the State court, there shall be a separable controversy, that is, there is in the suit a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove the suit into the district court of the United States for the proper district.

### *Local Prejudice.*

Where a suit is between citizens of different States in State court, and a nonresident defendant shall make it appear that from prejudice or local influence he will not be able to obtain

justice in the State court, he may remove to the Federal court of the proper district: Provided, if the suit can be justly and fully determined as to other defendants without being affected by such prejudice or local influence, and a separation of the parties can be had without prejudice, the Federal court may remand the suit as to such parties for trial in the State court. It is further provided that on the removal by the plaintiff on account of local prejudice, the district court may, on application of the defendant, examine into the truth of the affidavit made by the plaintiff for removal on the ground of local prejudice, and should remand if the grounds are not sustained.

#### *Improper Removal and Remand.*

It is further provided that if the court should decide the removal was improper, it should order the remand to the State court, which shall be carried into execution immediately, and no appeal or writ of error can be sued out.

#### *Employers' Liability Act Forbids Removal.*

No suit brought in a State court under the employers' liability act approved April 22, 1908, or any amendment thereto, shall be removed to any court of the United States. *Strauser v. Chicago, B. & Q. R. Co.* 193 Fed. 294. (See Employers' Liability Act.)

#### *Procedure.*

Section 29 provides for procedure in removal, except suits removable on the ground of local prejudice, as follows: The defendant must file a petition duly verified in the State court at any time before the defendant is required by the laws of the State to answer or plead, for the removal to the United States court of the district in which the suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court *within thirty days* from the date of filing said petition a certified copy of the record in such suit, and for paying all costs that may be awarded

by the district court if said district court shall hold that such suit was improperly or wrongfully removed thereto, and also for their appearing and entering special bail, if special bail was originally requisite therein.

*Duty of State Court.*

Where these conditions have been performed it is the duty of the State court to accept said petition and bond and proceed no further in the suit. Simkins Fed. Eq. Suit, p. 805.

*Notice of Filing Petition for Removal.*

Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. Simkins Federal Equity Suit, 2d ed. p. 805.

*Time in Which Parties Removing Shall Plead in the Federal Court.*

The copy of the record in the State court being entered in the Federal court within thirty days, as aforesaid, the parties so removing the said cause shall have thirty days thereafter to plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if originally commenced in said district court.

Section 30 provides for removal of causes brought in the State court where one or more of the plaintiffs or defendants before the trial states to the court, or makes affidavit if the court requires it, that he or they claim or shall rely upon a right or title to the land under a grant from a State and produce the original grant, or an exemplification of it, etc., except where the record is lost, etc. The removal is to be made on petition and bond, as above stated, and the cause is to be removed for trial to the district court of the United States next to be holden in such district, and the one moving the cause shall not be allowed to plead or give evidence of any other title than the one stated as the cause of removal.

Sections 31 and 32 provide for removal where in a suit, civil

or criminal, brought in a State court against one who is denied or cannot enforce in the State tribunals any right guaranteed to him by the statute securing equal civil rights of citizens of the United States, or against any officer, civil or military, of the United States, or other person, for any trespass or arrest or imprisonment made by them by virtue of or color of authority derived from any law providing for equal rights as aforesaid, etc.

### *Procedure.*

The removal may be made on the petition of the defendant filed at any time before the trial or final hearing of the cause. Sections 31 and 32 give in detail the method of procedure.

### *In Suits Against Revenue Officers.*

Section 59 provides for removal of any civil suit or criminal prosecution commenced in any State court against any officer appointed under or acting by authority of any revenue law now or hereafter enacted by Congress, or against any person acting under or by authority of such officer, etc., or against any person on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, etc. The removal may be made at any time before the trial or final hearing of the cause in the State court, to the district court of the United States next to be helden in the district in which the suit or prosecution is pending. The balance of the section gives detailed information how to proceed.

### *Alien vs. Civil Officer of the United States.*

Section 34. When a personal action is brought by an alien against a civil officer of the United States, being a nonresident of the State in which the suit is brought and wherein jurisdiction is obtained by the State court by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have

been served with process, and the removal shall be in the same manner provided in section 33.

*Duty of Clerks of State Courts to Furnish Record of Suit.*

Section 35. If a party be entitled to copies of the record of any suit or proceeding therein, to be used in any court of the United States, and the clerk refuses to deliver them on demand after payment or tender of the legal fees, or to certify the same, the court may, on proof of these facts by affidavit, direct such record to be supplied by affidavit or otherwise, and the suit may proceed in the Federal court as if such copies had been furnished and duly certified. (See section 39.)

*Effect of Removal on Attachment or Other Writs Sued Out in the State Court.*

Section 36. When any suit shall be removed from a State court, any attachment or sequestration of the goods, etc., of the defendant had in such case in the State courts, shall hold the goods, etc., to answer the judgment or decree in the same manner as by law they would have been held to answer the judgment or decree of the State court. So all bonds, undertakings and securities taken in the case in the State court by either party prior to removal shall remain valid until dissolved or modified by the Federal court to which it has been removed. Simkins, *Federal Equity Suit*, 2d ed. pp. 811 et seq.

*When the Removed Suit is Not Within Federal Jurisdiction.*

Section 37. When it shall appear to the district court after removal that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of such district court of the United States, or that the parties have been made or collusively joined either as plaintiffs or defendants for the purpose of creating a case removable under this chapter, the said district court shall proceed no further, but shall dismiss the suit or remand it to the court from which it was re-

moved, and shall make such order as to costs as shall be just. Simkins, Federal Equity Suit, 2d ed. pp. 825, 826.

*Duty of Court When Properly Removed.*

Section 38. The court shall proceed with the case as if it had been originally commenced in the said district court of the United States, and the proceedings in the State court previously taken shall be considered as the proceedings of the United States district court.

*Remedies When the Clerk of the State Court Refuses to Give a Transcript for Removal.*

Section 39. If the clerk of the State court refuses to give to the party or parties applying to remove the case to the Federal court a copy of the record of the same after tender of legal fees for such copy, said clerk so offending shall, on conviction in the district court of the United States to which such action was removed, be fined not more than one thousand dollars or imprisoned not more than one year, or both. The district court may issue a writ of certiorari to said State court, commanding such court to make return of the record, etc., and enforce said writ according to law. Or the district court may require the prosecutor of any such action or proceeding, etc., to file a copy of the paper or proceeding by which the same was commenced within such time as the court may determine, and in default the court shall dismiss the suit, but if complied with, the court shall require the other party to plead and the case proceed, etc. Simkins, Federal Equity Suit, 2d ed. p. 805.

The above embodies the laws now in force permitting removals from the State to the district courts of the United States. There have been a few changes in the procedure by this new act, as follows:

First. It requires that written notice of filing the petition and bond for removal must be given to the adverse party or parties prior to filing the same.

Second. The certified copy of the record of the case must be filed in the United States district court of the proper district

within thirty days from the date of filing the petition for removal in the State court, instead of "the first day of the next term of the circuit court," etc., as in the act of 1888, and the party or parties so removing have thirty days from filing the record in the district court of the United States to plead, answer, or demur to the petition or complaint filed in the cause.

Third. The bond for removal must now be conditioned to file the record duly certified in the district court of the United States within thirty days from the date of filing said petition for removal, instead of "on or before the next regular session of the circuit court, etc."

Fourth. The value of the subject-matter must be alleged to be in excess of three thousand dollars exclusive of interest and costs.

Fifth. No case arising under "the act relating to the liabilities of railroads to their employees in certain cases" passed April 22, 1908, or any amendment thereto, brought in any State court of competent jurisdiction, can be removed to any court of the United States.

#### *Petitions for Removal and Forms.*

As to the substance of petitions for removal, see Simkins, Federal Equity Suit, 2d ed. p. 842. The following forms for petitions for removal may be used:

##### Title of Case.

In the District (or Superior) Court sitting in and  
for the County of ..... in the State of  
.....

To the Hon. ...., Judge of the District (or Superior)  
Court of the State of ....., sitting at .....

Now comes the defendant or defendants in the above-entitled cause (naming them) and files this his (or their) petition for the removal of this case from the aforesaid District (or Superior) Court in which it is now pending, to the District Court of the United States in and for the Western District of ....., held at the city of ..... in said District and State.

Petitioner would show unto your Honor:—

1st. That this cause was filed in your honorable court on the .... day of ....., A. D., 1912, and that the time to plead, answer, or demur

to the same has not expired under the laws of this State in such cases made and provided.

2d. That the suit is one of a civil nature at common law (see Simkins, Federal Equity Suit, 2d ed. pp. 848, 849), of which the district courts of the United States have original jurisdiction. (Here state briefly nature of the suit, showing the fact. See Simkins, Federal Equity Suit, 2d ed. p. 842.)

3rd. That the matter in dispute exceeds the sum of three thousand dollars exclusive of interests and costs. (See Simkins, Federal Equity Suit, 2d ed. pp. 169 et seq. and 845.)

4th. If the removal is sought on ground of diversity of citizenship, say that at the time of the commencement of this suit and since that time the plaintiff was and is now a citizen and resident of the State of ..... and County of ..... in said State, ..... And the defendant (or defendants) asking this removal was at the time of the commencement of this suit and since and is now a resident and citizen of the State of ....., residing in the County of ..... in said State ..... (Showing the defendant is a nonresident of the State in which the suit is brought. See Simkins, Federal Equity Suit, 2d ed. p. 828.)

Only indispensable parties should be considered; all others may be disregarded to prese ve jurisdiction. Rogers v. Penobscot Min. Co. 83 C. C. A. 380, 154 Fed. 610, and cases cited.

Or if the cause is separable between the plaintiff on the one side and one of the defendants who is a nonresident on the other side, then say that there is in the cause of action a controversy wholly between citizens of different States, for that at the time of the commencement of this suit and before and since the plaintiff, or plaintiffs (naming them) were citizens and residents of the State of ....., and the defendant (naming him, or them if more than one) was at the commencement of this suit and before and since that time and is now a citizen of the State of ..... That as between said defendant and the plaintiff there is a controversy which can be wholly determined between them both as to the issues of law and fact without affecting the interests of the other defendants in the case. (Here give briefly the nature of the issue showing the separable controversy.) (See Simkins, Federal Equity Suit, 2d ed. p. 837.)

Or if the suit is between a citizen and alien, and the alien is seeking to remove, the alien must allege that he at the commencement of this suit and since and is now a foreign citizen (or subject) to wit: a citizen of the Republic of France, or of the British Empire and a subject of His Britannic Majesty Edward VII. and a nonresident of the State of ....., in which the suit is brought (a resident alien cannot remove the suit) and there are no other parties to the suit. (See Simkins, Federal Equity Suit, 2d ed. pp. 832, 833.)

Or where a defendant who is a resident of the State is dismissed from the suit, leaving a nonresident defendant, such nonresident may file his petition after such dismissal, asking a removal of the cause to the proper Federal district court on the ground of diversity of citizenship, as above set forth.

Or where the existence of a "Federal question" is the ground of removal, the citizenship of the defendants is wholly immaterial in filing a petition for removal, as a citizen of the State in which the suit is brought may remove a cause of action to the Federal courts, based on a Federal question.

The petition must set forth that the question involved arises out of and depends on the proper construction of some clause of the Federal Constitution, some act of Congress or treaty made by United States authority. The clause of the Constitution, or the sections of the United States Revised Statutes, or the treaty which is involved in the suit should be specially pointed out, where the original petition in the suit shows that the cause of action arises under the laws, Constitution, or treaty of the United States. To remove the suit the Federal question must be set forth in the plaintiff's original petition and in his statement of his case (see Simkins, Federal Equity Suit, 2d ed. p. 843), showing definitely that the liability of the defendant seeking to remove the cause depends, as stated, on a Federal law, and the controversy is as to the operation and effect of these laws. (See Simkins, Federal Equity Suit, 2d ed. pp. 843 et seq.) Removals authorized by any person denied in a State court the enforcement of his rights under the civil rights act of Congress or against any officer, civil or military, for acts, trespasses or wrongs committed by virtue of or under color of authority derived from any Federal law, etc., are fully provided for by section 31 of the New Code both as to the conditions and the procedure for removal. See also section 32, New Code.

Removals in cases brought in State courts against revenue officers of the United States, or cases involving acts done or rights acquired under or by virtue of their authority, are fully provided for by section 33 of the New Code, and the petition for removal, in addition to the formal allegations heretofore given, need only follow the section providing for these removals.

And the same rule applies to removals under section 34, where an action has been brought by an alien against a civil officer of the United States, being a nonresident of the State in which the suit is brought.

*Conclusion and Prayer.*

Your petitioner herewith files a good and sufficient bond under the statute in such case made and provided, conditioned as the law directs and that he will within thirty days from the filing of the petition for removal file a certified copy of the record of the case in the District Court of the United States for the Western District of ....., and for the payment of all costs which may be awarded by said court, if the said District Court shall determine that this suit was improperly and wrongfully removed thereto.

Your petitioner therefore prays the court that it proceed no further herein except to order the removal, accept the bond herewith presented, and direct a transcript of the record to be made and certified as provided by law.

.....,  
Attorneys for Petitioner.

As to amending the petition for removal, see Simkins, Federal Equity Suit, 2d ed. p. 855.

*Verification of the Petition.*

A.B. or A.B. and C.D. being duly sworn say (or severally depose and say) that he is the petitioner or one of the petitioners for the removal of the case to the District Court of the United States as prayed for in said petition, that the allegations of said petition are true of his own knowledge, except such as are therein stated on information and belief, and as to such matters he believes them to be true.

Subscribed and sworn to} .....  
before me } Affiant  
.....

*Officer Taking, etc.*

If verification by attorney, use same form, except some reason must be shown why the defendant petitioner did not verify the petition.

*Bond for Removal.*

*Title of Case.*

In the District (or Superior) Court of the State of  
....., sitting in and for the County of  
....., in said State.

Know all men by these presents that we ..... as principals and

..... as sureties are held and firmly bound unto ..... the plaintiff or plaintiffs in this cause, his successors and assigns, in the sum of ..... dollars for the payment of which well and truly to be made, we and each of us bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Conditioned nevertheless, that whereas A.B. (or A.B. and C.D.) have applied to the District (or Superior) Court in and for the County of ....., in the State of ....., to remove the case pending therein wherein ..... is plaintiff and ..... is (or are) defendant (or defendants) to the District Court of the United States for the ..... District of ..... (or the division of said District) sitting in the City of ....., in said District and State, and that all further action in the State court aforesaid be stayed.

Now therefore if your petitioners shall enter in the District Court of the United States for the District aforesaid (or division of the District as aforesaid) within thirty days from the filing of this petition for removal a copy of the record of the suit as required by law, and shall pay or cause to be paid all costs that may be awarded therein by said District Court of the United States, if the said Court shall hold that said suit was improperly or wrongfully removed thereto,\* then this obligation to be void, else to be in full force and effect.

Signatures .....  
With surety or sureties .....

Approved and accepted.    }  
Judge .....

#### *Notice of Intention to File Petition and Bond for Removal.*

By section 29, New Code, notice in writing is required to be given by the petition or petitioners for removal to the adverse party prior to filing the petition and bond, that the same will be filed, as follows:

##### Title of Case.

Suit pending in the County of ....., in the  
State of .....

To Mr. ...., attorney for plaintiff.

Notice is hereby given that the defendant (or defendants) in the above entitled cause (naming them), will on the .... day of ..... A. D., ...., file in the District (or Superior) Court of the State of ....., sitting in and for the County of ....., in said State in which said suit is

---

\*NOTE.—When entering special bail in the suit is required, you may add, "and shall then and there enter special bail in said suit," section 29, New Code.

now pending, his (or their) petition and bond for the removal of the said cause from said State Court to the District Court of the United States in and for the ..... District in the State of .....

.....,  
Attorney for defendant.

Evidence of service accepted or officially served should appear. For effect of filing petition and bond in the State court, see Simkins, Federal Equity Suit, 2d ed. p. 804.

*Notice of Appearance.*

(Title of Case.)

To the clerk of the District Court of the United States in and for the ..... District of the State of .....

Please enter our appearance for the defendant in the above cause.

A. and B. ....,  
Attorneys for defendant.

*Motion to Remand.*

Title of Case.

In United States District Court, etc.

And now comes the plaintiff and moves the court to remand the above entitled cause to the District (or Superior) Court in and for the County of ....., in the State of ....., on the ground that, etc.

(State grounds for remanding.) (See form Simkins, Federal Equity Suit, 2d ed. p. 876.)

.....,  
Attorneys for plaintiff.

See Simkins, Federal Equity Suit, 2d ed. for causes for remanding, pp. 816 et seq.; also p. 874 (and proceedings thereunder) to p. 881.

*Order Remanding.*

(The Title of Case.)

(Title of Court.)

This cause coming on to be heard on the .... day of ....., A. D., ...., on a motion to remand, and the Court having fully considered the same, it is the opinion of the Court that the said motion should be granted, and it is ordered that this cause be and the same is hereby remanded to the District (or Superior) Court of the County of ....., in the State of ....., from which the same was removed, for further proceedings.

.....,  
District Judge.

S. S. at L.—11.

*Cannot Appeal From Order.*

By section 28 of the New Code, whenever the United States district court shall order the cause remanded, such remand shall be immediately carried into execution, and no appeal or writ of error remanding such cause shall be allowed. See "Remanding," Simkins, Federal Equity Suit, 2d ed. pp. 815 et seq.

*Removal for Prejudice or Local Influence.*

First. By section 28 of the New Code a nonresident may remove a cause from the State court to the proper district of the United States court at any time before the trial thereof in the State court, when it is made to appear that from prejudice or local influence he will not be able to obtain justice in the State court, or any other State court to which the defendant may under the laws of the State have a right to remove the said case because of prejudice or local influence.

Second. It is provided further that if the suit can be prosecuted as to other defendants in the State court without being affected by such prejudice or local influence, and that a separation of the suit would not be prejudicial to any of the parties to the same, then the United States district court may remand the case as to such defendants, though retained as to those against whom the prejudice complained of exists.

Third. Where the removal has been made on the affidavit of any party as to local prejudice or influence against him, the United States district court, upon application of the adverse party, must examine into the truth of the grounds of the affidavit, and if it does not appear that the prejudice or local influence exists, he must remand the cause to the State court for further proceeding. Simkins, Federal Equity Suit, 2d ed. pp. 800, 801.

*The Form for Petition.*

(Title of Case.)

(Title of Court.)

To the Hon. ...., Judge of the District (or Superior) Court of the State of ...., sitting in and for the County of ...., in said State.

Your petitioner (naming him) respectfully represents to this honorable

court that the plaintiff above named in the title of the case brought suit of a civil nature in the District Court of the County of ....., in the State of ....., against your petitioner (stating briefly nature of case).

That the amount (or value of the subject-matter) exceeds the sum of three thousand dollars exclusive of interest and costs.

That the plaintiff was, at the time of the commencement of the suit, and is now a citizen of the State of ....., residing in the County of ....., in said State, and that petitioner was and is now a citizen of the State of ....., and residing in the County of ....., in said State at the commencement of this suit.

That said cause has not been tried in the State court, and petitioner desires to remove the same before the trial thereof from said State court to the United States District Court to be held in the ..... District of the State of .....

Your petitioner therefore prays this honorable court to proceed no local influence against him in the County of ....., in the State of ....., where said cause is pending, and in favor of the plaintiff, he will not be able to obtain justice in said court, or in any other State court to which said defendant may, under the laws of the State, have a right to remove said cause on account of such prejudice or local influence.

Your petitioner herewith presents a good and sufficient bond under the statutes in such cases made and provided and conditioned as the law directs.

Your petitioner therefore prays this honorable court to proceed no further therein except to accept and approve the bond and enter an order removing the cause as prayed for, and direct the record as required by law to be made for transmission to the District Court of the United States as requested in said petition.

Signed by petitioner or petitioners.

With good and sufficient surety.

(Verification of the petition and form of bond as before given. See Simkins, Federal Equity Suit, 2d ed. pp. 800, 801.)

Having given the sections of the New Code relating to removals, and noted the changes made by said Code, which has been substituted for the jurisdictional and removal act of 1888, and having given the forms now required by reason of the changes made in removals from the State to the Federal courts, I will refer to Simkins, Federal Equity Suit, 2d ed., beginning at p. 798, for a construction of every phase of the law relating to removals.

1. As to proceedings in State courts, p. 802.
2. Powers of State courts, p. 806.

3. The bond and construction of, p. 803.
4. Effect of filing the petition and bond, p. 804.
5. Notice of filing petition for removal, p. 805.
6. Issue of fact as to removability where tried, pp. 807-830.
7. Petition and bond should be presented to the State court, pp. 807-808.
8. Order of removal, p. 808.
9. Power of Federal court between filing in the State court and filing the record in the Federal court, pp. 809-811.
10. Filing transcript, pp. 811, 812.
11. Status after removal, p. 813.
12. Defenses to be heard in the Federal court, p. 814.
13. Remanding, p. 815.
14. Motion to remand, pp. 811-819-874, and proceedings thereunder, to p. 881.
15. Statutes controlling the remanding of causes, p. 816.
16. Causes for remanding, pp. 816 to 827.
17. Diversity of citizenship as ground for removal and remanding, pp. 828-835.
18. Fraudulent joinder of parties to prevent removal, p. 829.
19. Fraudulent joinder in order to remove, p. 830.
20. How issue raised as to diversity of citizenship, and what must be shown, p. 831.
21. Removal by aliens, pp. 832, 833.
22. Removal by corporations, p. 834.
23. Who can remove in case of diversity of citizenship, p. 835.
24. Joinder and misjoinder of parties affecting removals, pp. 836, 837.
25. When controversy separable, p. 837, as to tort feasors, p. 839.
26. The whole case is removed, p. 841.
27. Removal on ground of Federal question, p. 843.
28. Who may remove on ground of Federal question, p. 844.
29. Amount as ground for removal or remanding, p. 845.
30. Effect of filing a counterclaim, p. 847.
31. Suit must be of a civil nature, and could have been originally brought in the Federal court, pp. 848-854.
32. As to amending the petition for removal, p. 855.

33. Service of process in State courts as affecting removals, p. 857.
34. Amending service of process after removals, p. 860.
35. Removal for local prejudice, and procedure, pp. 861 to 868.
36. Removal by receivers, p. 869.
37. By national banks, p. 871.
38. Intervention for removal, p. 871.
39. Interpleader, p. 873.
40. Remanding, pp. 874 to 881.

## CHAPTER XX.

### WRIT OF ERROR.

There are only two methods of reviewing causes in the appellate courts: (1) By appeal; (2) by writ of error. Appeal is the method by which equity cases are reviewed, which has been discussed in all its phases in Simkins, *Federal Equity Suit*, 2d ed. pp. 645-797, with forms required to perfect it. My purpose now is only to discuss writs of error, by which errors of law are revised.

The "writ of error" is the method of appeal from the law side of the court, by which errors of law only are revised by the appellate court. *Behn v. Campbell*, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502. A judgment at law cannot be revised by appeal, nor a decree in equity by a writ of error. This has been firmly adhered to by the Federal courts of last resort. *Highland Boy Gold Min. Co. v. Strickley*, 54 C. C. A. 186, 116 Fed. 852, and cases cited. *Stevens v. Clark*, 10 C. C. A. 379, 18 U. S. App. 584, 62 Fed. 321.

### *Section 914, Conformity Act, Does Not Apply.*

The conformity act is inapplicable to writs of error, appeals, or bills of exception; in fact, all preliminary proceedings to a review in the Federal appellate courts are governed by Federal statutes or rules, and if there is no statute or rule, then by the common law in writs of errors, and in equity by the practice of the high court of chancery of England. *Ex parte Chateaugay Ore & Iron Co.* 128 U. S. 544-553, 32 L. ed. 508-511, 9 Sup. Ct. Rep. 150; *St. Clair v. United States*, 154 U. S. 134-153, 38 L. ed. 936-943, 14 Sup. Ct. Rep. 1002; *Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.* 91 C. C. A. 196, 165 Fed. 162; *Francisco v. Chicago & A. R. Co.* 79 C. C. A. 292, 149 Fed. 359, 9 Ann. Cas. 628 and cases cited; *Connecticut F. Ins. Co. v. Manning*, 101 C. C. A. 107, 177 Fed. 896, and cases cited. The practice in this respect cannot be affected by State laws.

Francisco v. Chicago & A. R. Co. 79 C. C. A. 292, 749 Fed. 359, 9 Ann. Cas. 628; Ghost v. United States, 94 C. C. A. 253, 168 Fed. 843; Missouri P. R. Co. v. Chicago & A. R. Co. 132 U. S. 191, 33 L. ed. 309, 10 Sup. Ct. Rep. 65.

*Parties to Writs of Error.*

All parties to a suit who appear to have an interest in the judgment challenged by the writ must be made parties to the writ, or given notice of severance before an appellate court will review the case on its merits; if this is not done the writ of error will be dismissed. Lewis v. Sittel, 91 C. C. A. 191, 165 Fed. 157. The writ of error, then, that fails to name all parties interested, is defective. Estis v. Trabue, 128 U. S. 229, 32 L. ed. 438, 9 Sup. Ct. Rep. 58; Hardee v. Wilson, 146 U. S. 180, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; Humes v. Third Nat. Bank, 4 C. C. A. 668, 13 U. S. App. 86, 54 Fed. 920.

Where there is a joint judgment, all the defendants must join, unless a summons and severance has been taken, or due notice has been served, and other defendants refuse to join in the appeal. Loveless v. Ransom, 46 C. C. A. 515, 107 Fed. 627, and cases cited; Ibbs v. Archer, 107 C. C. A. 141, 185 Fed. 40, and cases cited. This requirement is jurisdictional, and objection may be made at any time before the disposition of the case in the court of appeals. Ibid.; Hook v. Mercantile Trust Co. 36 C. C. A. 645, 95 Fed. 41; Kidder v. Fidelity Ins. Trust & S. D. Co. 44 C. C. A. 593, 105 Fed. 821; Faulkner v. Hutchins, 61 C. C. A. 425, 126 Fed. 362. Thus, where persons composing a firm are not named in the writ, in the absence of summons and severance, the omission is fatal to the writ. Godbe v. Tootle, 154 U. S. 577, 19 L. ed. 831, 14 Sup. Ct. Rep. 1167; Port v. Schloss Bros. 79 C. C. A. 437, 149 Fed. 731.

*Summons and Severance.*

By summons and severance is meant that the plaintiff in error, one of several joint defendants, may appeal alone by giving notice to his codefendants of his intention to sue out a writ of error, and request them to join, and if they refuse he

may sue out his writ of error alone, by filing a motion in court stating the facts and asking for the issue of the writ in his behalf. The motion and order of severance should be made a part of the record to give the appellate court jurisdiction. See Simkins, Federal Equity Suit, 2d ed. p. 723. Where the writ was allowed to one of several defendants in a joint judgment in open court at the term in which the judgment was rendered, the writ will be sustained on the ground that notice in open court is equivalent to summons and severance. *McNulta v. West Chicago Park*, 39 C. C. A. 545, 99 Fed. 328; *Loveless v. Ransom*, 46 C. C. A. 515, 107 Fed. 627. But this must appear of record; otherwise the appeal will be dismissed. *Ireton v. Pennsylvania Co.* 107 C. C. A. 304, 185 Fed. 84; *Lamon v. Speer Hardware Co.* 111 C. C. A. 462, 190 Fed. 734, and cases cited. Again, the rule relates only to joint judgments, not a judgment against the plaintiff in error not involving other parties. *Alsop v. Conway*, 110 C. C. A. 366, 188 Fed. 572, and cases cited; *Love v. Export Storage Co.* 74 C. C. A. 155, 143 Fed. 1.

#### *Amendment of the Writ as to Parties.*

In *Thomas v. Green County*, 77 C. C. A. 487, 146 Fed. 969, it is said the amendment of the writ by adding the name of a plaintiff omitted by accident depends primarily on whether there is in the record enough to authorize the amendment; if it appears that the omission was accidental, it will be amended. In *Walton v. Marietta Chair Co.* 157 U. S. 346, 39 L. ed. 727, 15 Sup. Ct. Rep. 626, an amendment by substituting a name was allowed. See also *Nome & S. Co. v. Ames Mercantile Co.* 109 C. C. A. 650, 187 Fed. 928.

It has been held that the appellate court cannot take jurisdiction of a writ of error which describes parties by their partnership name; but where the record discloses the names of the individual partners who compose the firm, the writ of error can be amended under section 1005 U. S. Rev. Stat. U. S. Comp. Stat. 1801, p. 714. *Estis v. Trabue*, 128 U. S. 225-228, 32 L. ed. 437, 438, 9 Sup. Ct. Rep. 58.

We have seen that the citation in error, which is a notice to

the adverse parties to appear in the appellate court to show cause why the judgment should not be corrected, is intended to bring the adverse parties interested in the judgment into the appellate court. It should follow the writ as to parties, but it is not jurisdictional, and therefore may be amended if defective. However, where the names of parties are left out it cannot be amended by inserting them, but the appellate court may issue a new citation bringing the omitted parties into court, if they do not otherwise appear. *Martin v. Burford*, 100 C. C. A. 159, 176 Fed. 555; *Mendenhall v. Hall*, 134 U. S. 559, 33 L. ed. 1012, 10 Sup. Ct. Rep. 616; *Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980 (see citation in error).

Objection that plaintiff is not the real party in interest comes too late in the appellate court. *Northwestern S. S. Co. v. Cochran*, 111 C. C. A. 626, 191 Fed. 149, and cases cited. So also want of capacity to sue must be pleaded *in limine*; too late after trial to set it up. *Texas & P. R. Co. v. Jackson*, 193 Fed. 948; *St. Louis & S. F. R. Co. v. Herr*, 193 Fed. 950.

#### *Amendment of Writ of Error.*

We have seen that the writ of error may be amended as to parties. By U. S. Rev. Stat. sec. 1005, U. S. Comp. Stat. 1901, p. 714, it is specially provided that the supreme court may at any time, in its discretion, amend the writ of error, where there is a mistake in the teste, or seal wanting, or made returnable on wrong day, or statement of parties defective, or the title of the action, if such amendments can be made by reference to the record, and in all other particulars of form, provided the defect has not prejudiced and the amendment will not injure the defendant in error. *Walton v. Marietta Chair Co.* 157 U. S. 346, 347, 39 L. ed. 726, 727, 15 Sup. Ct. Rep. 626, construing and illustrating the act. The statute is sufficiently explanatory, but the amendments allowed, being within the court's discretion, will not be permitted if prejudicial to the defendant in error. *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436. Again, the amendment of the writ of error depends primarily on whether the record shows enough to amend by. U. S. Stat. Rev. sec. 1005, U. S. Comp. Stat. 1901, p. 714; *Estis v. Trabue*, 128 U. S. 228,

32 L. ed. 438, 9 Sup. Ct. Rep. 58; Martin v. Burford, 100 C. C. A. 159, 176 Fed. 555; Cotter v. Alabama G. S. R. Co. 10 C. C. A. 35, 22 U. S. App. 372, 61 Fed. 750, and cases cited.

*Statutes Regulating Where Writs of Error May be Taken.*

By section 5 of the act of March 3, 1891, 26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549, governing the existing Federal system regulating appeals, it is provided that writs of error may be taken from the district courts direct to the Supreme Court of the United States in the following cases: (1) In any case where the jurisdiction of the district court is in issue, in which cases the question only of jurisdiction can be certified for decision. See Fore River Shipbuilding Co. v. Hagg, 219 U. S. 177, 178, 55 L. ed. 164, 31 Sup. Ct. Rep. 185, and cases cited. (2) In any case which involves the construction or application of any clause of the Federal Constitution; or the constitutionality of any law of the United States; or when the validity of any treaty is drawn in question, or when the Constitution or law of the State is claimed to contravene the Constitution of the United States. (See Simkins, Federal Equity Suit, 2d ed. p. 665, for the practice in such cases.) The right is lost under this section by taking an appeal to the circuit court of appeals. Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490. By section 6 the jurisdiction of the circuit court of appeals of the United States to review by writ of error final decisions of the United States district courts embraces all cases other than those provided in section 5, as stated above, unless otherwise provided by law, and where the jurisdiction of the Federal court is dependent on diversity of citizenship or between aliens and citizens, the judgment of the circuit court of appeals is final, but the circuit court of appeals may certify to the Supreme Court any proposition of law concerning which it may desire instruction of the court as to the decision to be made by the circuit court of appeals. (New Code, sec. 239.) The Supreme Court may give the instruction, or may order up the whole record for review. Again, the Supreme Court, without any re-

quest on the part of the circuit court of appeals for instruction, may require any case to be certified for review. (New Code, sec. 240.) This section further provides for cases arising under patent laws, revenue laws, and admiralty cases. When submitted to the circuit court of appeals, the decision shall be final unless certified to the Supreme Court as stated above.

Again, by this section in all cases not made final by it there shall be of right a writ of error or appeal, or review of the case by the Supreme Court where the matter in controversy shall exceed the sum of one thousand dollars besides costs; but the writ of error or appeal must be sued out within one year after the entry by the circuit court of appeals of its judgment, order or decree sought to be reviewed. (See New Code, sec. 241.)

By the New Code, sec. 237, it is provided that a final judgment or decree in any suit in the highest court of the State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, or when any right, title, privilege, or immunity is claimed under the Constitution; or any treaty, statute, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority,—may be examined and reversed or affirmed in the Supreme Court on writ of error. Such writ has the same effect as if the judgment or decree complained of had been rendered in the United States court, and the Supreme Court may reverse, modify, or affirm the judgment or decree of the State court, and may award execution or remand the same to the court from whence it was removed by the writ. U. S. Rev. Stat. sec. 1003, U. S. Comp. Stat. 1901, p. 713. This was a readoption of section 709, as amended in 1875, of the United States Revised Statutes, U. S. Comp. Stat. 1901, p. 575, without change. You will find in Simkins, Federal Equity Suit, 2d ed. chapter cxix. a thorough dis-

cussion of appeals from State courts direct to the Supreme Court of the United States, which can only be taken up and re-examined upon writ of error.

It will be seen that the purpose of the act is to restrain unconstitutional legislation by the States, rather than to correct errors. The five rules which control the Supreme Court in granting these writs of error are set forth and fully illustrated, Simkins, Federal Equity Suit, 2d ed. Also the time within which the writ can be sued out, and the amount as affecting the jurisdiction of the Supreme Court, as well as the practice and forms for each step, in the procedure, are set forth in Simkins, Federal Equity Suit, 2d ed. By section 1003, U. S. Rev. Stat. writs of error from the Supreme Court to State courts are issued under the same rules and in the same manner and in writs of error issued to the United States courts.

*Appeals from the Circuit Court of Appeals to the Supreme Court.*

Chapter cxvii. of Simkins Federal Equity Suit, 2d ed. takes up the practice under section 6 of the act of 1891 as above set forth, whereby the circuit court of appeals may certify to the Supreme Court at any time any questions of law in any case within its appellate jurisdiction, whether the jurisdiction of the circuit of appeals be final or not; and the Supreme Court may order up any cases within the jurisdiction of the circuit court of appeals which made final, by certiorari or otherwise; and gives the forms necessary to perfect the writ.

The certiorari requires, as will be seen in the reference above given, (1) a petition; (2) a certified copy of the transcript—a deposit; (3) an order for appearance and thirty copies of the petition and brief printed. S. C. Rule 37. See post, p. 259.

*Appellate Power of the Supreme Court in Cases Not Final in the Circuit Court of Appeals.*

In chapter cxviii. of Simkins, Federal Equity Suit, 2d ed. the review by the Supreme Court of cases not made final in the

circuit court of appeals when the matter in controversy exceeds one thousand dollars besides costs, as set forth in section 6, act 1891, and now embodied in the New Code, section 241, has been fully discussed, and forms given for the application for the writ of error for review.

*Appeals From the District Court Direct to the Supreme Court.*

It has been already stated when appeals by writ of error may be taken direct to the Supreme Court from the district courts. In chapter cv. of Simkins Federal Equity Suit, 2d ed. these appeals and the various conditions under which they may be taken as set forth in section 5 of the act of 1891 have been examined and exhaustively discussed, with the practice and forms necessary to perfect the appeal.

*Appeals by Writ of Error From the District Court to the Circuit Court of Appeals.*

By act of March 3, 1891, the circuit court of appeals was established to review by appeal or writ of error final decisions in the district courts and former circuit courts in all cases other than those provided for in section 5 of the act set forth above, and making final all judgments in cases in which the jurisdiction was entirely dependent on diversity of citizenship of the opposite parties to the suit, being between aliens and citizens or citizens of different States. Section 6, act of March 3, 1891. By the New Code, section 262, power is given to issue all writs not specifically provided by statute, which may be necessary for the exercise of its jurisdiction, according to the usages of law. See Simkins, Federal Equity Suit, chap. cvr. as to the jurisdiction of the circuit court of appeals to entertain jurisdiction of cases when the controlling questions therein come within clauses 4, 5, 6 of sec. 5 of the act of March 3, 1891, and chapter cvii. as to practice and forms in appeals to the circuit court of appeals. I will now proceed to discuss more particularly appeals by writ of error from the district courts of the United States to the circuit court of appeals.

*The JudgmentAppealed From Must be Final.*

By section 6 of the act of March 3, 1891, it will be seen that the jurisdiction to review by appeal or writ of error can be exercised only when the judgment or decree is final in the district court. It has been stated as a test of finality, that the controversy must be so settled in the district court, that an affirmance by the appellate court would leave nothing open, or to be done by the court below but to execute the judgment. *Morrison v. Burnette*, 83 C. C. A. 391, 154 Fed. 618; *Collin County Bank v. Hughes*, 81 C. C. A. 556, 152 Fed. 416; *Wecker v. National Enameling & Stamping Co.* 204 U. S. 181, 192, 51 L. ed. 434, 435, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757; *Loflin v. Ayres*, 90 C. C. A. 603, 164 Fed. 842; *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Fadley v. Baltimore & O. R. Co.* 82 C. C. A. 464, 153 Fed. 514; *Stevens v. Nave-McCord Mercantile Co.* 80 C. C. A. 25, 150 Fed. 71; *Cay v. Vereen*, 75 C. C. A. 667, 144 Fed. 839; *Morris v. Dunbar*, 79 C. C. A. 226, 149 Fed. 406; *Newcomb v. Burbank*, 159 Fed. 568. See *Simkins, Federal Equity Suit*, 2d ed. p. 607, and pp. 658-663, as to the finality of judgments and decrees. An appeal will not lie from an order dismissing as to one defendant until final judgment. *General Electric Co. v. Allis-Chalmers Co.* 194 Fed. 413.

*Judgment for Costs.*

Judgments for costs alone are not, as a general rule, appealable. However, the courts recognize exceptions sometimes. For authorities see *Simkins, Federal Equity Suit*, 2d ed. p. 663.

*Judgments by Consent.*

The old rule that judgments by consent cannot be appealed from is not always followed in the United States courts. See *Simkins, Federal Equity Suit*, p. 663, for authorities.

*Judgment of Nonsuit.*

Though not *res judicata* of the merits, it is reviewable as a

final judgment (Connecticut F. Ins. Co. v. Manning, 101 C. C. A. 107, 177 Fed. 893; Southern P. Co. v. Kelley, 109 C. C. A. 657, 187 Fed. 937) but not refusal to reinstate case after non-suit (Willis v. Davis, 107 C. C. A. 221, 184 Fed. 890).

### *The Object of the Writ of Error.*

The object of the writ is to bring before the appellate court for review questions of law only. Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502. There can be no inquiry as to errors of fact (*Id.* and cases cited; Dower v. Richards, 151 U. S. 663, 38 L. ed. 307, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704), as in appeals in equity (*Ibid.* 664). It is the application of the common-law writ, which was the principal method of redress for erroneous judgments in the King's court of record to some superior court of appeals. It only applied to errors of law arising on the face of the proceedings. There was no method of reversing for an error of fact except by new trial, the exclusive function of the court in an appeal by a writ of error being to correct alleged errors of law. Bort v. McCutchen, 109 C. C. A. 558, 187 Fed. 798; Wichita R. & Light Co. v. Delaney, 86 C. C. A. 397, 159 Fed. 417; Murhard Estate Co. v. Portland & S. R. Co. 90 C. C. A. 64, 163 Fed. 194.

### *Time Within Which it Must be Sued Out.*

If a party is aggrieved by the judgment or the rulings of the court during the progress of the trial to which proper objections and exceptions have been taken in a suit at law, he may have the same reviewed by the appellate court by suing, within the period prescribed by statute, a writ of error. The time within which it is to be sued out from the district to the circuit court of appeals is prescribed by section 11 of the act of 1891, establishing the "circuit court of appeals," as follows: No writ of error or appeal to review a judgment or decree in the circuit court of appeals shall be taken or sued out except within six months after the entry of the judgment; but in all cases in which a lesser time is now allowed by law, such limits of time shall apply as to writs of error sued out from the circuit court of appeals. Con-

don v. Central Loan & T. Co. 20 C. C. A. 110, 36 U. S. App. 579, 73 Fed. 907; Desvergers v. Parsons, 8 C. C. A. 526, 23 U. S. App. 239, 60 Fed. 143; Rutan v. Johnson, 64 C. C. A. 443, 130 Fed. 109; Marks v. Northern P. R. Co. 22 C. C. A. 630, 44 U. S. App. 714, 76 Fed. 941. This section is mandatory and jurisdictional, and it is settled that no consent can extend the time within which a writ of error must be sued as required by the statutes in such cases made and provided. Old Nick Williams Co. v. United States, 215 U. S. 541, 54 L. ed. 318, 30 Sup. Ct. Rep. 221, same case, 82 C. C. A. 73, 152 Fed. 926; Stevens v. Clark, 10 C. C. A. 379, 18 U. S. App. 584, 62 Fed. 323; Carriere & Son v. United States, 163 Fed. 1010; Clark v. Doerr, 75 C. C. A. 146, 143 Fed. 960. As to extending time for filing return to writ of error (Hall v. McKinnon, 193 Fed. 572), time given begins from entry of final judgment. Time given for allowance of a bill of exceptions does not affect or enlarge the time that the act prescribes for suing out the writ. Kentucky Coal, Timber, Oil & Land Co. v. Howes, 82 C. C. A. 337, 153 Fed. 163. The time cannot be enlarged by consent or by the court; it is jurisdictional. Stevens v. Clark, 10 C. C. A. 379, 18 U. S. App. 584, 62 Fed. 324; Dodson v. Fletcher, 24 C. C. A. 466, 49 U. S. App. 114, 79 Fed. 129; Carter County v. Schmalstig, 62 C. C. A. 78, 127 Fed. 127. But a motion for a new trial seasonably filed prevents the judgment entry, if made, from being final until the motion is overruled. Kentucky Coal, Timber, Oil & Land Co. v. Howes, 82 C. C. A. 337, 153 Fed. 163; Altenberg v. Grant, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980. In determining the time within the writ of error may be brought it is not considered brought until it is filed with the court which rendered the judgment. Old Nick Williams Co. v. United States, 82 C. C. A. 73, 152 Fed. 926, affirmed in 215 U. S. 543, 54 L. ed. 320, 30 Sup. Ct. Rep. 221; United States v. Baxter, 2 C. C. A. 410, 10 U. S. App. 241, 51 Fed. 624; Threadgill v. Platt, 71 Fed. 3; Mutual L. Ins. Co. v. Phinney, 22 C. C. A. 425, 48 U. S. App. 78, 76 Fed. 617. Filing of writ below is essential to be operative. Waxahachie v. Coler, 34 C. C. A. 349, 92 Fed. 285. In appeals from a State court to the Supreme Court of the United States the writ of error must be sued out within two years after judgment of the State court is entered.

U. S. Rev. Stat. sec. 1008, U. S. Comp. Stat. 1901, p. 715. This section saves disabilities existing, and the two years is computed from the removal of the disabilities. In appeals by writ of error from the United States district court to the Supreme Court of the United States under section 5 of the act of 1891, 26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549, two years is given within which to sue out the writ. U. S. Rev. Stat. sec. 1008, U. S. Comp. Stat. 1901, p. 715. *Farrar v Churchill*, 135 U. S. 613, 34 L. ed. 249, 10 Sup. Ct. Rep. 771. In appeals from the circuit court of appeals to the Supreme Court of the United States the writ must be sued out within one year (sec. 6, act 1891) after entry of the judgment. 26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550; *Allen v. Southern P. R. Co.* 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518. There are shorter terms of appeal provided by special acts, as in section 16 of the interstate commerce act, by which an appeal is required to be taken in twenty days from the judgment.

*Order of Proceeding to Obtain the Writ.*

It is provided by section 11 of the act of 1891, U. S. Comp. Stat. 552, that all provisions of law now in force regulating the system and methods of review by writ of error shall apply to writs of error to the United States circuit court of appeals. The usual order of procedure is:—

- (1) A petition for the writ, addressed to the judge of the trial court in term or vacation;
- (2) The petition must be accompanied with an assignment of errors and a prayer for reversal;
- (3) The writ of error bond, the approval, and the signing of the citation by the judge allowing the writ;
- (4) Order of the judge in writing allowing the writ;
- (5) Issuing the writ by the clerk of the trial court or appellate court. See U. S. Rev. Stat. sec. 997, U. S. Comp. Stat. 1901, p. 712.

These successive steps will be taken up in their order  
S. S. at L.—12.

*Petition for the Writ.*

The petition in writing for a writ of error is merely a general request for the issuing of the writ, without mentioning any specific grounds; these must be found in the "assignment of errors," which must accompany the petition, setting forth the orders and proceedings and judgment excepted to during the progress of the trial and assigned for error.

*Form of the Petition.*

In the District Court of the United States for the ..... District of ...., sitting at .....  
 A.B. } vs. at Law.  
 C.D. }

To the Hon. ...., Judge of the District Court aforesaid.  
 Now comes ..... (name of party petitioning) .....  
 ...., by attorney and respectfully shows that on the .... day of  
 ...., A. D., ...., the court directed (or found) a verdict (or a jury duly  
 impaneled found a verdict, etc.) against your petitioner and in favor of  
 ...., and upon said verdict a final judgment was entered  
 on the .... day of ...., A. D., ...., against your petitioner (plaintiff  
 or defendant) ....

Your petitioner, feeling himself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the ..... circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at ...., in said circuit for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiffs in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

.....,  
 Atty. for petitioner in error.

*Amendment of.*

A technical mistake, the result of accident, will be amended,

and not dismissed. Green County v. Thomas, 211 U. S. 598, 53 L. ed. 343, 29 Sup. Ct. Rep. 168, U. S. Rev. Stat. § 1005.

#### *Order Granting the Writ.*

It is sufficient for the court to indorse on the petition "Writ of error granted this the ..... day of ....., A. D.," and also the amount of bond or security to be given by the plaintiff in error may be as follows: "Supersedeas bond fixed at ..... dollars," and signed by the judge. Or a separate order may be drawn granting the prayer of the petition and fixing the amount of bond or security conditioned as the law directs, and staying all proceedings until the determination of the writ of error by the appellate court.

In Simpson v. First Nat. Bank, 63 C. C. A. 371, 129 Fed. 257-259, a distinction is drawn between granting an appeal and granting a writ of error as to the power of the court. In cases of granting an appeal it is held that it is a matter of right, and the court has no discretion, but in granting a writ of error it becomes a matter for judicial determination as to the sufficiency of the grounds appearing in the petition and assignment of errors.

#### *Effect of the Allowance.*

An order allowing the writ is ineffective until the bond is accepted. Kentucky Coal, Timber, Oil & Land Co. v. Howes, 82 C. C. A. 337, 153 Fed. 163; Simpson v. First Nat. Bank, 63 C. C. A. 371, 129 Fed. 257. The filing of the petition, assignment of errors, and bond is the beginning of a new suit in the appellate court, and accepting the bond and signing the citation by the trial judge in effect transfers the jurisdiction over the case to the appellate court. McKay v. Neussler, 78 C. C. A. 154, 148 Fed. 86; Citizens' Bank v. Farwell, 66 C. C. A. 30, 12 U. S. App. 419, 56 Fed. 539; Draper v. Davis, 102 U. S. 370, 26 L. ed. 121.

It brings before the appellate court for review the record, the pleadings, the bill of exceptions, the judgment, and any agreed statement of facts. Fellman v. Royal Ins. Co. 107 C. C. A. 637, 185 Fed. 689.

## CHAPTER XXI.

### ASSIGNMENT OF ERRORS.

By U. S. Rev. Stat. sec. 997, U. S. Comp. Stat. 1901, p. 712, it is provided that with any writ of error there shall be annexed to and returned an assignment of errors, a prayer for reversal, with a citation to the adverse party. (Sup. Ct. Rule 35, post, p. 258.) See Simkins, Federal Equity Suit, 2d ed. p. 698. By rule 11 of all the circuits (post, p. 272) it is provided that the plaintiff in error shall file with the clerk of the court below, with his petition for a writ of error, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. (See Simkins, Federal Equity Suit, 2d ed. p. 695.) No writ of error shall be allowed until such assignment of errors shall have been filed. In appeals from circuit court of appeals to Supreme Court, see Simkins, Federal Equity Suit, 2d ed. p. 769. We see, then, that the assignment of errors at or before the allowance of the writ is indispensable; that is, without such assignment no writ of error can be granted; or if the record should not contain an assignment of errors as required by the rule, and filed at or before the allowance, the appeal will be dismissed (Simpson v. First Nat. Bank, 63 C. C. A. 371, 129 Fed. 257; Mutual L. Ins. Co. v. Conoley, 11 C. C. A. 116, 25 U. S. App. 86, 63 Fed. 180; Dufour v. Lang, 4 C. C. A. 663, 2 U. S. App. 477, 54 Fed. 913; P. P. Mast & Co. v. Superior Drill Co. 83 C. C. A. 157, 154 Fed. 45, and cases cited), as errors not assigned will not be considered (Russel v. Huntington Nat. Bank, 89 C. C. A. 558, 162 Fed. 868; New York L. Ins. Co. v. Rankin, 89 C. C. A. 103, 162 Fed. 103; see Simkins, Federal Equity Suit, 2d ed. p. 695, chapter cviii.). Court will not search record for errors. Green County v. Thomas, 211 U. S. 602, 53 L. ed. 345, 29 Sup. Ct. Rep. 168. So additional assignments filed after the writ is perfected will not be allowed. P. P. Mast & Co. v. Superior Drill Co. 83 C. C. A. 157, 154 Fed. 45. However, the filing of the assignment of error is not a jurisdictional question, as appellate

courts will notice plain errors not assigned. Flagler v. Kidd, 24 C. C. A. 123, 45 U. S. App. 461, 78 Fed. 341; Old Nick Williams Co. v. United States, 215 U. S. 541, 54 L. ed. 318, 30 Sup. Ct. Rep. 221; all circuits rule 11, 79 C. C. A. xxvii., 150 Fed. xxvii; P. P. Mast & Co. v. Superior Drill Co. 83 C. C. A. 157, 154 Fed. 45; New York L. Ins. Co. v. Rankin, 89 C. C. A. 103, 162 Fed. 104; Baltimore & O. R. Co. v. McCune, 98 C. C. A. 561, 174 Fed. 991; Santaella v. Otto F. Lange Co. 84 C. C. A. 145, 155 Fed. 719; United States v. Bernays, 86 C. C. A. 52, 158 Fed. 793. So, by Supreme Court rules 21 and 35 (see post, pp. 251, 258) the court may examine the record for plain error,—especially where no objection was made to the failure to assign error. This case was submitted on errors assigned only in the brief. U. S. Rev. Stat. secs. 997-1012, U. S. Comp. Stat. 1901, pp. 712-716; Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 54 L. ed. 877, 30 Sup. Ct. Rep. 581, 19 Ann. Cas. 854; New York L. Ins. Co. v. Rankin, 89 C. C. A. 103, 162 Fed. 103; Baltimore & O. R. Co. v. McCune, 98 C. C. A. 561, 174 Fed. 991; Bell v. Union P. R. Co. 194 Fed. 366. Of course errors not assigned under the rule not noticed if raised. Russell v. Huntington Nat. Bank, 89 C. C. A. 558, 162 Fed. 871. The discretion reserved in all circuits rule 11 (see post, p. 272) has been frequently exercised where probable injustice is apparent in the disposition of case (National Acci. Soc. v. Spiro, 24 C. C. A. 334, 47 U. S. App. 293, 78 Fed. 774), but not when the error was only technical and probably immaterial (Atchison, T. & S. F. R. Co. v. Mulligan, 14 C. C. A. 547, 34 U. S. App. 1, 67 Fed. 569; United States v. Kelly, 32 C. C. A. 441, 61 U. S. App. 263; 89 Fed. 954; Esterly v. Rua, 58 C. C. A. 548, 122 Fed. 611, and cases cited). The error must be prejudicial. Cook v. Foley, 81 C. C. A. 237, 152 Fed. 41; Ætna Indemnity Co. v. J. R. Crowe Coal & Min. Co. 83 C. C. A. 431, 154 Fed. 547; Inman Bros. v. Dudley & D. Lumber Co. 76 C. C. A. 659, 146 Fed. 449 (see Harmless Error).

*How Assignments of Error Should be Set Forth.*

All circuits rule 11 (see post, p. 272) requires:

- (1) That each assignment must particularly and separately

set out each error asserted and intended to be relied on and urged;

(2) That where the assignment alleges error as to the admission or rejection of evidence the assignment should quote the full substance of the evidence admitted or rejected;

(3) When the error assigned is as to the charge of the court, or any part of it, the part objected to should be referred to *in totidem verbis*, whether the error alleged be to the giving or refusal of the charge.

(1) *Each Assignment must be Separately and Particularly Set Out.*

The alleged error of law assigned must be sufficiently specific, so that the understanding and attention of the court is at once arrested without being forced to search the record to determine what the issue is. Grape Creek Coal Co. v. Farmers' Loan & T. Co. 12 C. C. A. 350, 24 U. S. App. 38, 63 Fed. 891; Piper v. Cashell, 58 C. C. A. 396, 122 Fed. 616; Esterly v. Rua, 58 C. C. A. 548, 122 Fed. 609. Thus, an assignment of error that the court erred in overruling defendant's motion for a new trial and entering judgment for plaintiff is too indefinite to be considered. Western U. Teleg. Co. v. Winland, 104 C. C. A. 439, 182 Fed. 494. General assignments are not noticed. Deering Harvester Co. v. Kelly, 43 C. C. A. 225, 103 Fed. 262; The Myrtie M. Ross, 87 C. C. A. 175, 160 Fed. 19; Garrett v. Pope Motor Car Co. 94 C. C. A. 334, 168 Fed. 905. In complying with the mandatory provision of the rule you must keep in mind that a multiplicity of assignments defeats the purpose of the rule, and will not be countenanced by the courts; as over much detail will reduce your assignments to a general assignment of error, which the rule forbids. Chicago G. W. R. Co. v. McDonough, 88 C. C. A. 517, 161 Fed. 657; Florida C. & P. R. Co. v. Bucki, 16 C. C. A. 42, 30 U. S. App. 454, 68 Fed. 866, 867.

An assignment that the verdict is not justified by the evidence and is contrary to law will not be considered, as it does not conform to the rule. Chicago, M. & St. P. R. Co. v. Anderson, 94 C. C. A. 241, 168 Fed. 902, and cases cited; Ireton

v. Pennsylvania Co. 107 C. C. A. 304, 185 Fed. 84; Western U. Teleg. Co. v. Winland, 104 C. C. A. 439, 182 Fed. 493.

So, an assignment that the court erred in overruling defendant's motion to take the case from the jury, when the exception taken to the ruling neither recites nor shows that it contains all the evidence (Chicago v. Troy Laundry Mach. Co. 89 C. C. A. 470, 162 Fed. 678); or that the court erred in rendering judgment against the defendant and in favor of plaintiff (United States v. Ferguson, 24 C. C. A. 1, 45 U. S. App. 457, 78 Fed. 103; Louisiana, A. & M. R. Co. v. Levee Comrs. 31 C. C. A. 121, 58 U. S. App. 281, 87 Fed. 594; Supreme Lodge, K. P. v. Withers, 32 C. C. A. 182, 59 U. S. App. 177, 89 Fed. 160). Assignments of error on rulings are not considered if the record does not otherwise show the rulings, nor are rulings reviewable if not assigned as error. Bell v. Union P. R. Co. 194 Fed. 366. Or the court erred in ruling out evidence, failing to state the substance of the evidence ruled out or admitted over objection, is fatally defective. P. P. Mast & Co. v. Superior Drill Co. 83 C. C. A. 157, 154 Fed. 45; Pioneer S. S. Co. v. Jenkins, 111 C. C. A. 44, 189 Fed. 312; Newman v. Virginia, T. & C. Steel & I. Co. 25 C. C. A. 382, 42 U. S. App. 466, 80 Fed. 228. An assignment that the court erred in charge is fatal if not stating the particular error in the charge. Russel v. Huntington Nat. Bank, 89 C. C. A. 558, 162 Fed. 871. Or that the judgment is contrary to the law and the evidence. Craig v. Dorr, 76 C. C. A. 559, 145 Fed. 307.

(2) *When Error Assigned is as to the Admission or Rejection of Evidence.*

A general objection to the admission or rejection of evidence does not comply with the rule, and unless the ground of objection upon which the assignment is based is specifically set out, the assignment will not be considered. Haldane v. United States, 16 C. C. A. 447, 32 U. S. App. 607, 69 Fed. 819; Erie R. Co. v. Schomer, 96 C. C. A. 458, 171 Fed. 798-805; Pioneer S. S. Co. v. Jenkins, 111 C. C. A. 44, 189 Fed. 312.

In Burton v. Driggs, 20 Wall. 125, 22 L. ed. 299, it is said "that it is a rule of law that when a party excepts to the ad-

mission of evidence he must state the specific objections, or it cannot be made the basis of error;" and it must further appear that the objections assigned were assigned in the court below and seasonable exceptions taken. In Merchants' Ins. Co. v. Buckner, 49 C. C. A. 80, 110 Fed. 345, it is said the ground of exception must be shown that the court may understandingly correct the error, if any. Baltimore & O. R. Co. v. Hellenthal, 31 C. C. A. 414, 60 U. S. App. 156, 88 Fed. 116; Oswego Twp. v. Travelers' Ins. Co. 17 C. C. A. 77, 36 U. S. App. 13, 70 Fed. 225; National Bank v. First Nat. Bank, 10 C. C. A. 87, 27 U. S. App. 88, 61 Fed. 809; Star Co. v. Madden, 110 C. C. A. 652, 188 Fed. 910; Van Gunden v. Virginia Coal & I. Co. 3 C. C. A. 294, 8 U. S. App. 229, 52 Fed. 838.

Again, alleged errors in the admission or exclusion of evidence will not be considered unless the testimony so excluded or admitted is set out substantially in the assignment of errors, as required by rule 11. Haldane v. United States, 16 C. C. A. 447, 32 U. S. App. 607, 69 Fed. 819; American Nat. Bank v. National Paper Co. 23 C. C. A. 33, 40 U. S. App. 646, 77 Fed. 85; Newman v. Virginia T. & C. Steel & I. Co. 25 C. C. A. 382, 42 U. S. App. 466, 80 Fed. 228; Lincoln Sav. Bank & S. D. Co. v. Allen, 27 C. C. A. 87, 49 U. S. App. 498, 82 Fed. 148.

So in refusing or admitting documents, the full substance of the document should be set out in the assignment. Atlas Distilling Co. v. Rheinstrom, 30 C. C. A. 10, 58 U. S. App. 550, 86 Fed. 244. So, where a witness is not permitted to testify, the full substance of the answer expected from the witness should be set forth in the assignment. United States ex rel. Coquard v. Indian Grave Drainage Dist. 29 C. C. A. 578, 57 U. S. App. 416, 85 Fed. 928; Smith v. Hopkins, 57 C. C. A. 193, 120 Fed. 923.

So, general assignments that the court erred in permitting evidence as shown by bill of exceptions 1, 2, and 3, which can be ascertained only by reading the record, will not be considered. Gallot v. United States, 31 C. C. A. 44, 58 U. S. App. 243, 87 Fed. 446; Smith v. Hopkins, 57 C. C. A. 193, 120 Fed. 923. So, an assignment of error "for permitting the case to go to the jury on the facts" will not be considered if it does not specify the question of fact desired to be submitted. Guggen-

heim v. Kirchhofer, 14 C. C. A. 72, 26 U. S. App. 664, 66 Fed. 755.

(3) *When the Error Assigned is to the Charge or Any Part Thereof.*

The rule requires the part objected to, to be set out *in totidem verbis*. So a general assignment to a charge, or part thereof, as, the court erred in its charge to the jury, will not be considered. Hart v. Bowen, 31 C. C. A. 31, 58 U. S. App. 184, 86 Fed. 877. And though the assignment be specific, it will not be considered if based on a general exception in the court below. Vider v. O'Brien, 10 C. C. A. 385, 18 U. S. App. 711, 62 Fed. 326; Erie R. Co. v. Kennedy, 112 C. C. A. 76, 191 Fed. 332; Baltimore v. Maryland, 92 C. C. A. 355, 166 Fed. 641; Garrett v. Pope Motor Car Co. 94 C. C. A. 334, 168 Fed. 905; Pickham v. Wheeler-Bliss Mfg. Co. 23 C. C. A. 391, 46 U. S. App. 605, 77 Fed. 663. A general assignment stating the court refused to charge the jury as requested, which requested instructions are herewith attached marked Exhibit "A," was held not to conform to the requirements of rule 11, requiring each exception to be separately stated. Sutherland v. Brace, 18 C. C. A. 199, 34 U. S. App. 454, 71 Fed. 469; Atchison, T. & S. F. R. Co. v. Mulligan, 14 C. C. A. 547, 34 U. S. App. 1, 67 Fed. 569. The assignment must comply with the rule. McClellan v. Pyeatt, 1 C. C. A. 613, 4 U. S. App. 319, 50 Fed. 686. Haldane v. United States, 16 C. C. A. 447, 32 U. S. App. 607, 69 Fed. 819; Gallot v. United States, 31 C. C. A. 44, 58 U. S. App. 243, 87 Fed. 446; Southwest Virginia Improv. Co. v. Frari, 7 C. C. A. 149, 8 U. S. App. 444, 58 Fed. 171.

Again, assignments of error to instructions asked and refused will be disregarded when they neither quote nor refer to the evidence that shows the relevancy of the proposition of law sought to be charged. Newman v. Virginia, T. & C. Steel & I. Co. 25 C. C. A. 382, 42 U. S. App. 466, 80 Fed. 228; Union Casualty & S. Co. v. Schwerin, 26 C. C. A. 45, 42 U. S. App. 514, 80 Fed. 638. See Chicago, M. & St. P. R. Co. v. Bennett, 104 C. C. A. 309, 181 Fed. 799, 800. See also Chapman v. Reynolds, 23 C. C. A. 166, 33 U. S. App. 686, 77 Fed. 274;

and Western North Carolina Land Co. v. Scaife, 25 C. C. A. 461, 42 U. S. App. 439, 80 Fed. 352, for exceptions. Again, assignments of error to giving or refusing instructions cannot be supported unless based on objections made and exceptions reserved before the jury retired. Star Co. v. Madden, 110 C. C. A. 652, 188 Fed. 910; Wabash Screen Door Co. v. Lewis, 106 C. C. A. 402, 184 Fed. 260; St. Louis & S. F. R. Co. v. Underwood, 194 Fed. 363.

You cannot raise a new issue by your assignment of error. Davis v. McEwen Bros. 193 Fed. 305.

#### *When No Assignment is Necessary.*

No assignment is necessary when record shows want of jurisdiction in the court below or appellate court (Morrison v. Burnette, 83 C. C. A. 391, 154 Fed. 617; Rogers v. Penobscot Min. Co. 83 C. C. A. 380, 154 Fed. 606); when the error is plain and fully appears in the record (Worthington v. McGough, 112 C. C. A. 662, 192 Fed. 513; Chicago, R. I. & P. R. Co. v. Barrett, 111 C. C. A. 158, 190 Fed. 118); nor when a special finding of fact is insufficient to support the judgment (Chicago, R. I. & P. R. Co. v. Barrett, *supra*).

#### *Form for Assignment of Error.*

In Central Trust Co. v. Continental Trust Co. 30 C. C. A. 235, 58 U. S. App. 604, 86 Fed. 517, it was held that the assignment of error set out in the petition for the writ was sufficient. The assignment of errors should bear the title of the trial court. Church Cooperage Co. v. Pinkney, 95 C. C. A. 462, 170 Fed. 266.

#### *Assignments of Error.*

In the District Court of the United States for the ..... District of ....., sitting at ....., in said District.

A.B.]  
vs. } at Law. No. —.  
C.D.]

Now comes ..... (name of party, plaintiff or defendant,

plaintiff in error) in the above numbered and entitled cause, and in connection with his petition for a writ of error in this cause assigns the following errors which plaintiff in error avers occurred on the trial thereof, and upon which he relies to reverse the judgment entered herein as appears of record:

- (1) That the court erred in overruling (or sustaining) the demurrer to the petition (or answer) filed in this cause, etc.
- (2) The court erred in not submitting to the jury the question, etc. (stating it).
- (3) The court erred in granting a motion to return a verdict in favor of the plaintiff in the cause, etc. (stating grounds).
- (4) The court erred in taking from the jury the right to pass upon the following issues of fact (stating them and the substance of the evidence showing materiality and supporting the contention).
- (5) The court erred in instructing a verdict for ..... on the cause of action (or defense) asserted because the uncontradicted evidence was, etc.

Wherefore plaintiff in error prays that the judgment of said court be reversed, etc.

(Signed) .....  
Attorney .....  
for plaintiff in error.

Filed this, the .... day of  
....., A. D., .... }  
....., .....

Clerk.

#### *Assigning Error in Overruling Motion to Dismiss.*

You may assign error in overruling motions to dismiss at close of plaintiff's evidence (*Lydia Cotton Mills v. Prairie Cotton Co.* 84 C. C. A. 129, 156 Fed. 225), though the motion was not renewed at the close of all the evidence. In *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493, it is said the refusal to instruct a verdict for defendant at the close of plaintiff's evidence is good ground for error, if defendant rests his case on plaintiff's evidence and introduces none in his own behalf. In *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685, the same proposition is stated. The proposition should be qualified as follows: Where the defendant's evidence does not appear in the record, or where the defendant's evidence does not affect the probative force of plaintiff's evidence. *Lydia Cotton*

Mills v. Prairie Cotton Co. supra. I have fully discussed assignment of errors in Simkins, Federal Equity Suit, 2d ed. chapter cviii., beginning on page 694, covering:

- (1) The necessity for assigning errors with the petition for appeal, p. 695;
- (2) Must be specific, p. 696;
- (3) Time of filing, p. 698;
- (4) Confined to the issues, p. 698;
- (5) To the admission or rejection of evidence, p. 699, to which reference is made for further information on the points above stated.

#### *Cross Errors.*

An appellee or defendant in error who takes no appeal or writ of error cannot, by assigning cross errors, or by brief or argument, confer jurisdiction to consider or review them. Texas Co. v. Central Fuel Oil Co. 194 Fed. 1; Morrison v. Burnette, 83 C. C. A. 391, 154 Fed. 617; O'Neil v. Wolcott Min. Co. 27 L.R.A.(N.S.) 200, 98 C. C. A. 309, 174 Fed. 527, 528, and cases cited. (See Simkins, Federal Equity Suit, 2d ed. p. 696). Texas Co. v. Central Fuel Oil Co. 194 Fed. 1; Swager v. Smith, 194 Fed. 762. Mere assertion of error in brief of appellee was insufficient to confer jurisdiction to review the error, where no cross appeal was taken and cross error assigned. Swager v. Smith, 194 Fed. 763-765, and cases cited.

#### *Bond.*

By U. S. Rev. Stat. sec. 1000, U. S. Comp. Stat. 1901, p. 712, every judge signing a citation on any writ of error, except in cases brought by the United States, or by direction of any department of government, shall take good and sufficient surety, that the plaintiff in error shall prosecute his writ to effect, and if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs where it is not a supersedeas. All circuit rules 13

provides the amount to be given in different cases as follows:— Rule 13 (see post, p. 272). Supersedeas bonds must be taken with good and sufficient security, conditioned that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good. Where the judgment is for the recovery of money, not otherwise secured, it must be for the amount of the judgment, including damages for delay, and costs and interest on appeal; but in suits where the property necessarily follows the suit, as in real actions and suits on mortgages, or where the property is in the custody of the marshal, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, then only an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay and costs and interest on the appeal. Rule 29 Supreme Court of the United States (see post, p. 256, and Simkins, Federal Equity Suit, 2d ed. pp. 704, 705).

*Form of Bond.*

Writ of Error Bond.

A.B. }  
vs. } at Law. No. \_\_\_\_.  
C.D. }

Know all men by these presents that we, ..... and ..... , and ..... , as sureties, are held and firmly bound unto (defendants in error naming them) or (corporation naming it) in the full and just sum of ..... dollars to be paid to the said ..... , its attorneys, successors, administrators, executors, or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these presents.

Signed and dated this the .... day of ....., A. D., ....

Whereas lately at a regular term of the District Court of the United States for the ..... District of ..... , sitting at ..... , in said District, in a suit pending in said court between A.B. as plaintiff and C.D. as defendant, cause No. ...., on the law docket of said court final judgment was rendered against the said ..... for the sum of ..... dollars with interest thereon at the rate of ..... (or whatever the judgment may be), and the said ..... has obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the said court in the aforesaid suit, and a citation directed

to the said ..... defendant in error, citing him (or them) to be and appear before the United States Circuit Court of Appeals for the ..... Circuit to be helden at ....., in the State of ....., according to law within thirty days (30) from the date hereof.

Now the condition of the above obligation is such that if the said ..... shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

Signed ..... ,  
S sureties .....

Approved this the .... day  
of ....., A. D., .... }  
..... ,  
Judge.

The bond must be approved by the judge, and not the clerk, to become a supersedeas. Gay v. Hudson River Electric Power Co. 190 Fed. 812. (See When Writ of Error a Supersedeas; also Simkins, Federal Equity Suit, 2d ed. p. 707.)

State of ..... ,  
County of ..... }

I, ..... , clerk of the United States District Court for the ..... District of ..... do hereby certify that A.B. and C.D. and E.F. ...., parties to this bond whose genuine signatures appear subscribed to the above bond are in my opinion good and ample security for the amount therein specified, and that they have property in said County of ....., subject to execution in excess of the amounts of said bond, and that if the bond was presented to me for approval the same would be accepted and approved.

Witness my hand this the .... day of ....., A. D., ....

..... ,  
Clerk.

Filed this the .... day  
of ....., A. D., .... }  
..... ,

Clerk.

#### *Condition of Bond.*

The condition "to answer all damages and costs if the plaintiff in error fails to make his plea good" must be strictly observed in drawing the bond, as the condition covers the amount

of the judgment, damages for delay, if any, and costs accrued in the prosecution of the suit. Rosenstein v. Farr, 51 Fed. 368, same case 3 C. C. A. 466, 5 U. S. App. 197, 53 Fed. 112; Davis v. Patrick, 6 C. C. A. 632, 12 U. S. App. 629, 57 Fed. 909; Wood v. Brown, 43 C. C. A. 474, 104 Fed. 203; Egan v. Chicago G. W. R. Co. 163 Fed. 344; American Surety Co. v. North Packing & Provision Co. 102 C. C. A. 258, 178 Fed. 810; Fidelity & D. Co. v. Expanded Metal Co. 106 C. C. A. 114, 183 Fed. 569. See Simkins, Federal Equity Suit, 2d ed. p. 706.

#### *Amount of Bond.*

The Supreme Court rule 29 and all circuits rule 13, cl. 1 (see post, pp. 256, 272), provide that the amount of a supersedeas bond when for the recovery of money not otherwise secured must be for the amount of the judgment, including damages for delay, and costs and interest on the appeal; but where there is other security, or the property is in the hands of the court, etc., then the amount of the bond should be in a sum sufficient to secure damages for delay and costs and interest. (See authorities above cited.)

Again, it will be seen that section 1000, U. S. Rev. Stat., referred to above, provides for both a supersedeas and a bond not a supersedeas, the last in an amount to cover costs, in which case the bond should be in an amount to cover all costs accrued in the prosecution of the suit, both in the court below as well as in the appellate court. The Joseph B. Thomas, 158 Fed. 559; Fidelity & D. Co. v. Expanded Metal Co. 106 C. C. A. 114, 183 Fed. 570, same case, 177 Fed. 604. See Newcomb v. Burbank, 104 C. C. A. 164, 181 Fed. 334. And this is the rule though the case is brought *in forma pauperis* in the court below. The Joseph B. Thomas, 158 Fed. 559.

For further discussion of the bond, its effect and the liability of the sureties, see Simkins, Federal Equity Suit, 2d ed. pp. 704 to 715, 787-790; as to irregularities in, see p. 707; as to supersedeas bond, see p. 710, chapter cx.; as to amendment of, see p. 709; when insufficient after appeal, see p. 709.

Requirement of bond does not go to the essence of the appeal.

A new bond may be given. *Taylor v. Leesnitzer*, 220 U. S. 90-93, 55 L. ed. 382-384, 31 Sup. Ct. Rep. 371.

Where a supersedeas bond is given under the State law, and suit is brought in the Federal court, the State law will be followed. *Pennsylvania use of Huidekoper v. Fidelity & D. Co.* 180 Fed. 292.

### *The Writ of Error.*

#### Form of Writ.

(State title, etc.)

*United States of America, ss.*

The President of the United States ..... to the Hon.  
Judge of the District Court of the United States for the .....  
District of ..... Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between ..... plaintiff in error, and ..... defendant in error, a manifest error has happened to the damage of ..... plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the ..... Circuit, together with this writ, so that you have the same at ..... in the State of ....., where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

Witness the Hon. ...., Chief Justice of the United States, this the .... day of ...., A. D., ....

.....  
Clerk of the United States District Court  
for the ..... District of .....

Allowed this the .... day}  
of ...., A. D., ....}

.....,  
United States Judge.

### *Issuing the Writ.*

It must be remembered that the writ is a writ of the ap-

pellate court, although by U. S. Rev. Stat. sec. 1004, U. S. Comp. Stat. 1901, p. 713, the writ may be issued by the clerk of the district court as well as by the clerk of the appellate court. U. S. Rev. Stat. secs. 1003, 1004; *Mussina v. Cavazos*, 6 Wall. 357, 18 L. ed. 811; *Threadgill v. Platt*, 71 Fed. 3; *Northern P. R. Co. v. Amato*, 1 C. C. A. 468, 1 U. S. App. 113, 49 Fed. 881; *Kentucky Coal, Timber, Oil & Land Co. v. Howes*, 82 C. C. A. 337, 153 Fed. 165.

It is the duty of the plaintiff in error to apply to the clerk as may be most convenient, for the writ, and to deposit it with the clerk of the trial court, who should at once place his file mark upon it, to show the date of service. *Kentucky Coal, Timber, Oil & Land Co. v. Howes*, 82 C. C. A. 337, 153 Fed. 165.

It is not the duty of either clerk to issue it without application to him and demand therefor. *Id.* Though allowed, the appeal will be dismissed if not issued and served as above stated, for the writ is not brought until thus issued and served by filing it in the trial court (*Polleys v. Black River Improv. Co.* 113 U. S. 83, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; *United States v. Baxter*, 2 C. C. A. 410, 10 U. S. App. 241, 51 Fed. 624; *Waxahachie v. Coler*, 34 C. C. A. 349, 92 Fed. 285); and in law cases it is essential to appellate jurisdiction (*Mussina v. Cavazos*, 6 Wall. 358, 18 L. ed. 811; *Threadgill v. Platt*, 71 Fed. 2; *Mutual L. Ins. Co. v. Phinney*, 22 C. C. A. 425, 48 U. S. App. 78, 76 Fed. 618).

#### *Service of the Writ.*

As we have seen, the writ of error must be served, and the service is made when deposited with the clerk of the trial court. *Kentucky Coal, Timber, Oil & Land Co. v. Howes*, 82 C. C. A. 337, 153 Fed. 165; *Old Nick Williams Co. v. United States*, 215 U. S. 543, 54 L. ed. 320, 30 Sup. Ct. Rep. 221.  
*S. S. at L.—13.*

## CHAPTER XXII.

### SUPERSEDEAS.

*When Writ of Error may be a Supersedeas.*

By U. S. Rev. Stat. sec. 1007, U. S. Comp. Stat. 1901, p. 714, when the writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays excluded, after entering the judgment and giving the security required by law on issuing the citation. If he desires to stay the process on the judgment he may, having served his writ of error as aforesaid, give the security required by law, within (60) sixty days after the rendition of such judgment, or afterwards with the permission of a justice, or judge of the appellate court, and in such cases where a writ of error may be a supersedeas, execution shall not issue until the expiration of ten days. *Sutherland v. Pearce*, 108 C. C. A. 657, 186 Fed. 787; *Robinson v. Furber*, 189 Fed. 919.

*Must be Issued in Sixty Days.*

Unless the writ is issued in sixty days, Sundays excepted, and served, a judge of an appellate court cannot grant the supersedeas. *Danville v. Brown*, 128 U. S. 503, 32 L. ed. 507, 9 Sup. Ct. Rep. 149; *Danielson v. Northwestern Fuel Co.* 55 Fed. 49. The allowance of the writ will not warrant the grant of a supersedeas after sixty days after the judgment. *Robinson v. Furber*, 189 Fed. 919; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. ed. 810. But time does not begin to run until a motion for a new trial, if filed within time, is disposed of. U. S. Rev. Stat. secs. 987-1007, U. S. Comp. Stat. 1901, pp. 708-714; *Sanborn v. Bay*, 194 Fed. 37-41, and cases cited. (See When New Trial may be Applied for.)

*Kitchen v. Randolph*, supra, construes U. S. Rev. Stat. sec.

1007, limiting the time to sixty days from rendering the judgment to obtain a supersedeas, beyond which time it cannot be obtained. In *Sage v. Central R. Co.* 93 U. S. 412, 23 L. ed. 933, the court says a supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the statutory conditions,—citing cases. Time is an essential element in the proceeding that the court cannot disregard. If a delay beyond the limited time occurs, the right to the remedy is gone and the successful party holds his judgment discharged from this method of staying the process for its collection. It is a right he has acquired, and it takes some process of law to deprive him of it. This rule has never been departed from. See *Logan v. Goodwin*, 41 C. C. A. 573, 101 Fed. 654; *New England R. Co. v. Hyde*, 41 C. C. A. 404, 101 Fed. 397. To be a supersedeas the bond must be approved by the judge allowing the writ of error, whether the district or appellate judge. *Gay v. Hudson River Electric Power Co.* 190 Fed. 812.

*Supersedeas, Matter of Right.*

In *McCourt v. Singers-Bigger*, 80 C. C. A. 56, 150 Fed. 102, it is said that a supersedeas is a matter of right, and when applied for under the statute, its allowance does not vest in the discretion of the judge; as a matter of law it is a compliance with the statute, which, when done, leaves no discretion in the judge; in fact, the only function of the judge is to determine the sufficiency of the security covering damages and costs and compliance with the statute. *Ibid.* 105; U. S. Rev. Stat. secs. 1000, 1007, 1012, U. S. Comp. Stat., 1901, pp. 712, 714, 716; *Goddard v. Ordway*, 94 U. S. 672, 24 L. ed. 237.

As to a supersedeas on a subsequent appeal of the case, see *McCourt v. Singers-Bigger*, *supra*.

*Judgment on Supersedeas Bond.*

Judgment on a supersedeas bond given to secure a money judgment will not be entered in the appellate court, but should be entered on motion in the trial court. *Clarksdale v. Williamson*, 194 Fed. 412. When the statutes of a State authorize a

summary judgment against the sureties on a supersedeas bond, the Federal courts will enforce them. *Egan v. Chicago G. W. R. Co.* 163 Fed. 344.

*As to Execution.*

By the amendment of 1875 "sixty" days in the original statute was changed to "ten" days from the date of the entry of the judgment before execution could issue by the judgment plaintiff, in cases where the writ of error may be a supersedeas. Where execution does issue within the ten days the supersedeas only operates to stay any further steps, but not any right acquired by the issue of the execution.

## CHAPTER XXIII.

### CITATION IN ERROR.

The citation in error is intended only as notice to the opposite party to appear in the appellate court. In *Hewitt v. Filbert*, 116 U. S. 142, 29 L. ed. 581, 6 Sup. Ct. Rep. 319, and *United States v. Phillips*, 121 U. S. 254, 30 L. ed. 914, 7 Sup. Ct. Rep. 874, it is said that a citation is always required in writs of error, and differs from appeals in that notice in open court is not sufficient to excuse the issue and service of a citation. *Loveless v. Ransom*, 48 C. C. A. 434, 109 Fed. 391.

### *Should be Signed.*

By section 998 of U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 712, the citation shall be signed by the judge of the district court, a judge of the circuit court of appeals, or by a justice of the Supreme Court. By section 999, U. S. Rev. Stat., when the writ is issued by the Supreme Court the citation may be signed by a justice of that court, or by a judge of the court from whence the writ of error is taken. When issued by the Supreme Court to a State court, the citation shall be signed by the chief justice or judge or chancellor of the State court rendering the judgment, or by a justice of the Supreme Court of the United States. The failure of the judge to sign the citation is cured by filing the transcript, and the entry of appearance by the defendant in error. *Freeman v. Clay*, 1 C. C. A. 115, 2 U. S. App. 151, 48 Fed. 849. One judge may sign the citation and another may approve the bond. *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 314.

### *Service and Return of the Citation.*

By section 998, on the citation to the circuit court of appeals the adverse party shall have at least (20) twenty days' notice. See *Simkins, Federal Equity Suit*, 2d ed. chapter cxi. p. 716.

By section 999, when the writ is issued by the Supreme

Court the adverse party is to have (30) thirty day's notice; so when issued by the Supreme Court to a State court.

By the 5th section of rule 8 of the Supreme Court of the United States, all writs of error and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or term time, and must be served before the return day. Promulgated in 1891 (see post, p. 245). See also rule 14 all circuits, 5th clause (post, p. 274).

The 5th clause of rule 8 as given above is generally followed by all the circuit courts of appeal, but in some it differs, as in the eighth circuit, where citations must be made returnable not exceeding sixty days from the day of signing the citation, whether the return day fall in vacation or term time. It will be noticed that the rules generally require the citation to be returned in vacation or term time, and not on or before the next ensuing term, as formerly.

#### *How Service Made.*

The citation in error should be served personally on the attorneys of record or upon all the parties recovering the judgment. *Martin v. Burford*, 100 C. C. A. 159, 176 Fed. 555, and cases cited. Service by mail is insufficient. *Tripp v. Santa Rosa Street R. Co.* 144 U. S. 126, 36 L. ed. 371, 12 Sup. Ct. Rep. 655. Where the defendant has moved into another district a citation may be served by the marshal of the other district, or an order of service may be made by publication if personal service cannot be made. Of course service accepted by the attorneys or parties indorsed on the citation, or otherwise in writing, is sufficient.

We see, then, by the rules generally the return must be made not exceeding thirty days from the day of signing the citation, and it must be served before the return day. Sup. Ct. Rules 8, cl. 5 (see post, p. 245); all circuit rules 14, cl. 5 (see post, p. 274).

The citation must be served before return day.

#### *Not Jurisdictional.*

While the time for the service and return of the citation

should be followed, yet it is not jurisdictional; as said before, it is intended only as notice to the adverse party, and may be waived or substituted by other notice that is equivalent. Sutherland v. Pearce, 108 C. C. A. 657, 186 Fed. 784, 787; Nome & S. Co. v. Ames Mercantile Co. 109 C. C. A. 650, 187 Fed. 928; Martin v. Burford, 100 C. C. A. 159, 176 Fed. 554; Lockman v. Lang, 65 C. C. A. 621, 132 Fed. 4; Dayton v. Lash, 94 U. S. 112, 24 L. ed. 33. If erroneous or defective, a new citation may be issued. Shute v. Keyser, 149 U. S. 649, 37 L. ed. 884, 13 Sup. Ct. Rep. 690; Nome & S. Co. v. Ames Mercantile Co. and Martin v. Burford, *supra*; Altenberg v. Grant, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980. But one may waive service by general appearance. Richardson v. Green, 130 U. S. 115, 32 L. ed. 875, 9 Sup. Ct. Rep. 443; Tuft v. Santa Rosa Street R. Co. 144 U. S. 129, 36 L. ed. 373, 12 Sup. Ct. Rep. 655.

*It may be Amended.*

If defective it may be amended (Thomas v. Green County, 77 C. C. A. 487, 146 Fed. 969, 970, and cases cited; U. S. Rev. Stat. sec. 1005, U. S. Comp. Stat. 1901, p. 714), but not where the names of parties have been left out, and it is sought to add them by amendment. In such case a new citation should issue. Martin v. Burford, 100 C. C. A. 159, 176 Fed. 555, and cases cited; Mendenhall v. Hall, 134 U. S. 559, 33 L. ed. 1012, 10 Sup. Ct. Rep. 616.

So, issuing citation after time for filing appeal has expired does not defeat jurisdiction. Berliner v. Gramophone, 47 C. C. A. 630, 108 Fed. 714. So, when made returnable in less time than required by law, it was not sufficient ground to dismiss the writ. Seagrist v. Crabtree, 127 U. S. 773, 32 L. ed. 323, 8 Sup. Ct. Rep. 1394.

Where a writ of error is seasonably returned and docketed in the circuit court of appeals in vacation and before the term next ensuing after its allowance, the court may at its next term order an alias citation to bring in parties not served under the former citation. 28 C. C. A. 244; Gilman v. Fernald, 72 C. C. A. 666, 141 Fed. 940; Smith v. Ferst, 14 C. C. A. 96. 30 U. S. App. 87, 66 Fed. 798.

## CHAPTER XXIV.

### THE TRANSCRIPT.

By section 997, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 712, there must be annexed to and returned with the original writ of error an authenticated transcript of the record of the case in the trial court, with an assignment of errors, a prayer for reversal, and a citation to the adverse party to appear in the appellate court.

By all circuits rule 14 (see post, p. 274) the clerk of the court to which any writ of error may be directed shall make a return of the same, by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case under his hand, and seal of the court. Supreme Court rule 8, cl. 1 (see post, p. 244); *Dalton v. Moore*, 72 C. C. A. 459, 141 Fed. 311.

Irrelevant papers or proceedings need not be included, and the clerk should require of the attorney for plaintiff in error a præcipe stating what the transcript shall contain, and attach a copy of præcipe to the transcript, and certify that the transcript is full and correct according to the præcipe. *Burnham v. North Chicago Street R. Co.* 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 168; *Tuttle v. Claffin*, 31 C. C. A. 419, 59 U. S. App. 602, 88 Fed. 122.

The second clause of all circuits rule 14 requires that the opinion of the court filed in the case shall be annexed to the transcript and transmitted to the appellate court (Supreme Court rule 8, cl. 2; see post, p. 245), but you cannot refer to the opinion for facts (*Pacific Sheet Metal Works v. California Canneries Co.* 91 C. C. A. 108, 164 Fed. 980, 984, and cases cited), nor to help the findings (*Saltonstall v. Birtwell*, 150 U. S. 417, 37 L. ed. 1128, 14 Sup. Ct. Rep. 169).

Clause 4 of the same rule provides that whenever it shall be necessary or proper, in the opinion of the presiding judge in any district court, that original papers of any kind should be inspected in this court upon writ of error, such presiding

judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and the appellate court will receive and consider such original papers in connection with the transcript of the proceedings. Supreme Court rule 8, cl. 4 (see post, p. 245); Dowagiac Mfg. Co. v. Brennan, 156 Fed. 216. See Craig v. Smith, 100 U. S. 226, 25 L. ed. 577.

By rule 15 of all circuits, any document in a foreign language transmitted in the transcript without a translation under the authority of the court below, or admitted to be correct, will prevent the record from being printed for submission, and, the fact being reported to the appellate court, it will order the transcript returned in order that the translation may be supplied (see post, p. 278). As to authentication of the record, see "Certificate."

I have thus grouped the statute and rules providing for the transmission of the transcript and what it shall contain.

It is noticed that the proceedings required to be authenticated and transmitted must be returned with the writ of error, which means that the original writ must be attached to the transcript, unless lost or destroyed, when a copy may be used with certificate showing why a copy is used. Mussina v. Cavazos, 6 Wall. 357, 18 L. ed. 810. As we have seen, the writ is the foundation of appellate jurisdiction; it is in effect the process of the appellate court commanding the court below to send up with the writ a transcript of the record of the case that the error complained of, if it exists, may be corrected. Again, as we have seen, when deposited with the clerk of the court to whose judge it is directed, it is served; the return to the writ is the transcript. Mussina v. Cavazos, 6 Wall. 355, 18 L. ed. 810. In this case it was not returned attached to the transcript, but after the transcript had reached the appellate court it was attached, the court permitting it because it had performed its function in bringing the transcript up. See Cotter v. Alabama G. S. R. Co. 10 C. C. A. 35, 22 U. S. App. 372, 61 Fed. 747; Burnham v. North Chicago Street R. Co. 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 168.

*The Transcript Must be Complete.*

It first must show jurisdictional facts, both as to the jurisdiction of the court *á quo*, as well as the process by which the jurisdiction of the appellate court attaches. Kaw Valley Drainage Dist. v. Union P. R. Co. 90 C. C. A. 320, 163 Fed. 838. That being shown, the assigned errors come up for consideration, and as nothing can be considered except as it appears in the record, the plaintiff in error should see that his record is complete. To this end there should be included in the transcript (*Ibid.*, and cases cited):

- (1) The petition or declaration;
- (2) The process and return;
- (3) The issue, whether made by plea, demurrer, or answer, or all;
- (4) The joining of issue by replication, supplemental petition, or other methods permitted by the State practice;
- (5) Impaneling jury if any;
- (6) Verdict, whether the facts were found by a jury, or a finding by the court;
- (7) The judgment;
- (8) The opinion of the court (while it has been held that the opinion of the court is no part of the record, though required by the rules as we have seen, to be sent up, yet it is extremely important should the issue require what was decided to be ascertained);
- (9) Bill of exceptions duly taken at the trial;
- (10) Petition for writ of error;
- (11) Assignment of errors;
- (12) Bond and approval;
- (13) Allowance of writ of error;
- (14) The writ of error;
- (15) Citation in error;
- (16) Clerk's certificate.

Avoid irrelevant and useless matter as required by rule 14 above set forth. Union P. R. Co. v. Stewart, 95 U. S. 279, 284, 24 L. ed. 431, 433; Burnham v. North Chicago Street R. Co. 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 168. And pursue the rules as grouped above, as the transcript must be

complete or the court may dismiss the appeal. *Kansas v. Meriwether*, 96 C. C. A. 281, 171 Fed. 39-42, and cases cited. It is the better practice for counsel to agree by written stipulation as to what the record should contain; but if they cannot agree, then the plaintiff in error should file a praecipe with the clerk, pointing out specifically what he wishes the record to contain (*Re A. L. Robertshaw Mfg. Co.* 135 Fed. 222, and cases cited), and in directing the clerk it is only necessary to pursue the order given above in making up the transcript. However, where the moving party gives no directions it is the duty of the clerk to see that the transcript is a true copy of the proceedings necessary to the hearing in the court above, and to be in the order stated as specified in rule 14 (see post, 274), and his certificate must clearly show that fact. *Teller v. United States*, 49 C. C. A. 263, 111 Fed. 120, and cases cited; *Pennsylvania Co. v. Jacksonville, T. & K. W. R. Co.* 5 C. C. A. 53, 2 U. S. App. 606, 55 Fed. 131; *Dodge v. Norlin*, 66 C. C. A. 425, 133 Fed. 369; *Blanks v. Klein*, 1 C. C. A. 254, 2 U. S. App. 155, 49 Fed. 1.

Again, the party who moves for review is responsible to the appellate court to have inserted in the transcript all papers necessary to the hearing, and for that reason when he files with the clerk a praecipe the clerk should follow it; but while this is ordinarily true, the clerk has certain responsibilities in making up the record; and where the praecipe leaves out any matter required by the rules, the clerk should disregard it. *Teller v. United States*, 49 C. C. A. 263, 111 Fed. 121; *Kansas v. Meriwether*, 96 C. C. A. 281, 171 Fed. 39. See *Meyer v. Mansur & T. Implement Co.* 29 C. C. A. 465, 52 U. S. App. 474, 85 Fed. 875, as to the extent of the duty of the clerk in following the praecipe, and authorities cited; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 245; *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 334.

As said before, the record must be complete. Rule 14 requires that no case shall be heard until a complete record containing in itself, and not by reference, all the papers necessary to the hearing in the appellate court, shall be filed (see post, p. 273). However, parts of the record left out by direction of plaintiff in

error will not bar a hearing if the omitted parts are not necessary to the hearing. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* supra.

*Authentication of the Record.*

When the transcript of the original record is attached to the writ of error, and it is returned to the appellate court under the seal of the trial court, and duly certified to by the clerk of the trial court, it is said to be authenticated.

*The Form of Certificate.*

United States of America,  
..... District of .....

I, ..... , clerk of the United States District Court for the ..... District of ..... , do hereby certify that the foregoing (number of) pages presents a true, full, and correct copy of the proceedings had and orders entered as therein stated, in cause No. ...., wherein A.B. was plaintiff and C.D. was defendant, as the same appears of record and on file in this office, except that the original writ of error and citation in error are embraced therein at pages .... and ...., respectively, all of which constitute the entire transcript of the proceedings in the cause.

Witness my official signature and seal of said District Court at my office in the city of ..... , State of ..... , this the .... day of ..... A. D., .....

.....  
Clerk.

**SEAL.**

See *Meyer v. Mansur & T. Implement Co.* 29 C. C. A. 465, 52 U. S. App. 474, 85 Fed. 874; *Mackay v. Fox*, 57 C. C. A. 439, 121 Fed. 487. The jurisdiction of the appellate court attaches on filing the writ of error in the office of the clerk of the district court in which the cause is tried, so that irregularities in the transcript or the certificate of the clerk do not defeat jurisdiction, but they may be amended. *Burnham v. North Chicago Street R. Co.* 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 169, and cases cited; *Meyer v. Mansur & T. Implement Co.* supra. When properly authenticated, it imports absolute verity, and it cannot be contradicted, nor explained, nor extended by evidence *dehors* the record. *Re McCall*, 76 C. C. A. 430, 145 Fed. 902, citing *Evans v. Stettinisch*, 149 U. S. 605, 37 L. ed. 866, 13 Sup. Ct. Rep. 931; *Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 23

*Diminution of the Record.*

Where the record sent up is incomplete, the party complaining may suggest a diminution of the record, which is rectified by a writ of certiorari ordering the court below to complete the record by sending up under certificate the omitted parts. *Kansas v. Meriwether*, 96 C. C. A. 281, 171 Fed. 42; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 238; *Re A. L. Robertshaw Mfg. Co.* 135 Fed. 221; *Flickinger v. First Nat. Bank*, 76 C. C. A. 132, 145 Fed. 164, and cases cited. In such cases certiorari acts as an auxiliary process to enable the court to obtain further information as to some matter already before it for adjudication. *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 78 Fed. 661, 662.

By rule 18 (all circuit rules) and Supreme Court rule 14 (see post, pp. 248, 282) to award a certiorari, a motion must be made setting up the facts verified by affidavit and at the first term, or cause shown for delay. *Chappell v. United States*, 160 U. S. 505, 40 L. ed. 512, 16 Sup. Ct. Rep. 397. In *Kansas v. Meriwether*, 96 C. C. A. 281, 171 Fed. 42, attention is called to a more simple practice permitted in *Florida C. R. Co. v. Schutte*, 100 U. S. 644, 25 L. ed. 605, where the complaining party was ordered to file with the clerk of the appellate court a statement of the papers and proof used on the hearing below, which have been omitted from the transcript, and which he alleges is necessary for the hearing in the appellate court, which said documents and proofs must be duly certified by the clerk of the trial court, and sent up under the seal of the court.

Again, where the complaining party files with his "suggestion of diminution" the omitted documents, proceedings, or proof claimed to be "necessary for a hearing" etc., duly certified, and otherwise conforming to the rules for authentication of the record, the appellate court may order the omitted documents to be incorporated. *Burnham v. North Chicago Street R. Co.* 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 168. Under a writ of certiorari from an appellate court, the court below may by a *nunc pro tunc* order make any changes in the record to

make it conform to the facts and what was actually done. *Hays v. Wagner*, 80 C. C. A. 275, 150 Fed. 533.

If a bill of exceptions does not embody all the evidence necessary for passing on the question assigned as error the remedy is by certiorari for diminution of the record. *Merrill v. Floyd*, 2 C. C. A. 58, 5 U. S. App. 90, 50 Fed. 849. A plaintiff in error is not entitled to a writ of certiorari to perfect a bill of exceptions which occurred through his negligence, where application for the writ was not made until after the trial court had lost jurisdiction to amend the bill. *New York & N. E. R. Co. v. Hyde*, 5 C. C. A. 461, 5 U. S. App. 443, 56 Fed. 188; *Kerrch v. United States*, 96 C. C. A. 257, 171 Fed. 365. So certiorari for incorporating evidence will be denied where the motion does not show that the evidence in question forms a part of the bill of exceptions. *Dow v. United States* 27 C. C. A. 42, 49 U. S. App. 474, 81 Fed. 1004. One record sufficient where the appeal is taken by both parties. *U. S. Rev. Stat. sec. 1013*, U. S. Comp. Stat. 1901, p. 716.

*Transcript to be Filed.*

We have seen that by the 5th clause of all circuits rule 14 (see post, p. 274), and Supreme Court rule 8, cl. 5 (post, p. 245), all writs of error and citations are made returnable not exceeding thirty days from the date of signing the citation, whether it fall in term time or vacation. By all circuits rule 16 (see post, p. 279) the plaintiff in error must docket the case and file the record in the court of appeals on or before the return day, whether in vacation or term time. For good reason the judge signing the citation may enlarge the time, or any judge of the court of appeals may do so, if done before the time for filing has expired; the order enlarging the time must be filed with the clerk of the court of appeals. *Chamberlain Transp. Co. v. South Pier Coal Co.* 61 C. C. A. 109, 126 Fed. 167. So we see the rules governing the return and filing of the transcript are clearly directory. A reasonable excuse for not filing within the time will be entertained (*Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed 314), and it is in the sound discretion of the court to relieve parties who have not

complied with the rule (*Florida v. Charlotte Harbor Phosphate Co.* 17 C. C. A. 472, 30 U. S. App. 535, 70 Fed. 883; *Love v. Busch*, 73 C. C. A. 545, 142 Fed. 431; *Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980). Rule 16 (all circuit rules), and rule 9 of the Supreme Court (see post, pp. 245, 279), in respect to dismissing a writ of error not docketed in time, are the same, and the Supreme Court in construing this rule has held that if the motion to dismiss was not made before the appeal was docketed it would not be entertained (see "Citation, Service and Return"). See *West Chicago Street R. Co. v. Ellsworth*, 23 C. C. A. 393, 46 U. S. App. 603, 77 Fed. 665; *The Kawailani*, 63 C. C. A. 347, 128 Fed. 880; *Andrews v. Thum*, 12 C. C. A. 77, 21 U. S. App. 459, 64 Fed. 149.

#### *Motion to Dismiss Record.*

Motion to dismiss a record because filed after the time allowed will not prevail if the record was filed before the motion. *The Kawailani*, 63 C. C. A. 347, 128 Fed. 879. The record may be dismissed if not printed when called for argument. Rule 23, all circuits (see post, p. 287). *Lem Hing Dun v. United States*, 1 C. C. A. 209, 7 U. S. App. 18, 49 Fed. 145. The motion is discretionary with the court. *Matsumura v. Higgins*, 109 C. C. A. 431, 187 Fed. 601.

#### *Printing the Record.*

By rule 23 (all circuits) the counsel for plaintiff in error shall, at least six days before the case is called, print and file twenty copies of the record, unless a different order is made by the court, either of its own motion or upon application at least ten days before the case is called for argument. The parties may stipulate in writing for printing only parts of the record, and the case may be so heard, but the court may direct the printing of the other parts. The case may be dismissed if not printed when called for argument. The cost of printing is taxed as costs in the case. See *Lem Hing Dun v. United States*, *supra*.

*'Dismissing or Affirming on Certificate.'*

By all circuits rule 16 (see post, p. 279), if the plaintiff in error fails to comply with rule 16 to docket and file the record of the case by or before the return day, the defendant in error may have the case docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the trial court, stating the case and certifying that such writ of error was sued out or allowed, and in no case can the plaintiff in error docket the case and file the record after the case shall have been dismissed on certificate, unless by order of the court. But the defendant in error has the option of docketing the case and filing the record, and if the plaintiff in error docketed the case and files the record within the time permitted by this rule, or by the defendant any time thereafter, the case shall stand for argument at the term.

By all circuits rule 20 (see post, p. 284) the writ of error may be dismissed by written agreement of counsel filed with the clerk of the appellate court, and specifying the terms as to costs, and paying fees of clerk. The clerk is authorized in such case to enter the dismissal. If a mandate is necessary, the court must issue it by order.

The plaintiff in error cannot by right dismiss his appeal (*Donallan v. Tannage Patent Co.* 24 C. C. A. 647, 50 U. S. App. 1, 79 Fed. 385), and when dismissed on his motion he is not of right entitled to have it dismissed without prejudice (24 C. C. A. 647 and cases cited); there must be some equitable considerations. *Greene v. United Shoe Machinery Co.* 60 C. C. A. 93, 124 Fed. 963, 964, and cases cited; *Marden v. Campbell Printing-Press & Mfg. Co.* 15 C. C. A. 26, 33 U. S. App. 123, 67 Fed. 810. The appeal will be dismissed when the parties have settled their differences. *Benner v. Hayes*, 26 C. C. A. 271, 53 U. S. App. 376, 80 Fed. 953. As to dismissal of appeals, see Simkins, *Federal Equity Suit*, 2d ed. chapter cxv. pp. 744 to 747; also forms of motion to dismiss. Moot questions not reviewable. *Delaware, L. & W. R. Co. v. Lyne*, 193 Fed. 984. By all circuits rule 21 (see post, p. 285) no motion to dismiss an appeal shall be heard unless previous notice has been given to the adverse party or his counsel, except upon special assignment by the court. *Lem Hing Dun v. United*

States, 1 C. C. A. 209, 7 U. S. App. 18, 49 Fed. 145. By all circuits rule 31 (see post, p. 308) provision is made for allowance of costs on dismissal. As to motion to dismiss in the Supreme Court, see Supreme Court rule 6, sections 3, 4, 5 (see post, p. 243).

*Death of Party Pending a Writ of Error.*

By all circuits rule 19 (see post, p. 283), whenever either party shall die the proper representatives may come in and be made parties to the suit; if such representative party does not come in the other party may suggest the death and obtain an order that, unless the representative party shall become a party within sixty days, the party moving, if defendant in error, may have the appeal dismissed, and if he be plaintiff in error, he may have the record opened and the case reversed if error is found, provided, however a copy of the order to appear shall be served personally on said representative at least thirty days before the expiration of the sixty days. Rule 15 Supreme Court, cl. 3. Section 2 of the rule provides that if the representative of the deceased does not appear within ten days after the sixty days expire, and no measure taken to compel appearance, the suit abates (see post, p. 249).

Section 3. When at the time of suing out the writ of error the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered the judgment, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring the writ may procure the same, and have the proceeding on the judgment superseded or stayed in the same manner as now allowed by law in other cases, and shall thereupon proceed with such writ of error as in other cases; and within (30) thirty days after filing the record in the court of appeals the plaintiff in error shall make a suggestion supported by affidavit that the said party was dead when the writ of error was taken out and that he had no proper representative within the jurisdiction of the court rendering the judgment, so that the suit could not be revived there, and that said party had a proper representative in some other State or Territory, giving name and character of the representative  
S. S. at L.—14.

and the State, Territory or district in which he resides. He may obtain an order from the court of appeals that unless such representative shall make himself a party in (90) ninety days, the plaintiff shall be entitled to open the record and proceed with the case. Provided, however, a citation containing the substance of the order be served on the representative, either personally or left at his residence, at least thirty days before the expiration of the ninety days. Provided, also, if the representative does not appear within ten days after the expiration of the ninety days, and the measures above have not been taken within the time above required, the case shall abate. Provided, also, if the representative shall come in and make himself a party the case shall proceed. As to effect of death on appeals see Simkins, Federal Equity Suit, 2d ed. pp. 747-750; Conaway v. Third Nat. Bank, 92 C. C. A. 488, 167 Fed. 26, construing the 9th clause of the act of 1875, 18 Stat. at L. 473, chap. 137, sec. 9, U. S. Comp. Stat. 1901, p. 513, providing for procedure where either party dies after the judgment and before the writ of error is sued out.

### *Briefs.*

By all circuit rules 24, provision for filing briefs and what they shall contain is made. (See post, p. 297; Simkins, Federal Equity Suit, 2d ed. pp. 751-753).

(1) As to time of filing, it is required that the briefs be filed at least six days before the case is called for argument.

(2) Must file twenty copies. Russo-Chinese Bank v. National Bank, 109 C. C. A. 398, 187 Fed. 85.

(3) It must contain a concise abstract or statement of the case presenting briefly the questions involved.

(4) A specification of the errors relied upon, setting out separately and particularly each error asserted and intended to be relied upon. If there is no assignment of errors, counsel will not be heard except at the request of the court, and errors not specified will be disregarded, except a plain or fundamental error. Texas & P. R. Co. v. Reeder, 22 C. C. A. 314, 41 U. S. App. 775, 76 Fed. 550; Repauno Chemical Co. v. Victor Hardware Co. 42 C. C. A. 106, 101 Fed. 948-950, and cases cited;

Chicago G. W. R. Co. v. Egan, 86 C. C. A. 230, 159 Fed. 41-46, and cases cited; *Aetna Indemnity Co. v. J. R. Crowe Coal & Min. Co.* 83 C. C. A. 431, 154 Fed. 546; *Lincoln v. Sun Vapor Street Light Co.* 8 C. C. A. 253, 19 U. S. App. 431, 59 Fed. 756.

Where counsel do not consider errors assigned of sufficient importance to point out in their brief, the pages in the bill of exceptions in the printed record where the rulings of the court challenged may be found, the court, unless plain error, will not consider them of sufficient importance to search the record to find them, (86 C. C. A. 230, and cases cited; *Green County v. Thomas*, 211 U. S. 602, 35 L. ed. 345, 29 Sup. Ct. Rep. 168), and errors not pointed out or discussed will not be considered (*Ireton v. Pennsylvania Co.* 107 C. C. A. 304, 185 Fed. 84), as nothing is presented for review in the absence of an assignment of error (*Ibid.*).

Though an issue is raised by the pleadings, but not argued and noticed in the brief, it will be considered as abandoned. *Texas Co. v. Central Fuel Oil Co.* 194 Fed. 19, and cases cited.

So, where the plaintiff in error's brief does not contain specifications of the errors relied on, or, if alleged, are not discussed, they will not be considered. *Western U. Teleg. Co. v. Winland*, 104 C. C. A. 439, 182 Fed. 493; *Mann v. Dempster*, 104 C. C. A. 110, 181 Fed. 77.

We have, then, the rule that each specification in the brief must point substantially to the particular assignment of error on which it is based, with a reference in the brief to the page of the record where the assignment may be found, also to the place in the bill of exceptions where the alleged error assigned was excepted to as the basis of the assignment of error. *Vider v. O'Brien*, 10 C. C. A. 385, 18 U. S. App. 711, 62 Fed. 327; *Columbus Safe Deposit Co. v. Burke*, 32 C. C. A. 67, 60 U. S. App. 253, 88 Fed. 632; *New York Dry Goods Store v. Pabst Brewing Co.* 50 C. C. A. 295, 112 Fed. 382. When the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court or refusal to charge, the specification shall set out *in totidem verbis* the charge or part referred to, given or refused.

(5) There must be a clear statement of the points of law or fact to be discussed, with reference to the pages of the record and the authorities relied upon to support each point. When a statute of a State is cited, point at length so much as is applicable and necessary to a clear understanding of its application.

(6) The brief of the defendant must be filed three days before the case is called for hearing, and the above rules must be followed except as to a statement of the case and setting forth a specification of the errors.

(7) Parties defaulting under this rule: If plaintiff in error the case may be dismissed, and if defendant in error he will not be heard except by consent of adversary and by request of the court. *Moline Trust & Sav. Bank v. Wylie*, 79 C. C. A. 440, 149 Fed. 734; *Fitch v. Richardson*, 77 C. C. A. 423, 147 Fed. 196, 197; *Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 155, 123 Fed. 209, 22 Mor. Min. Rep. 688.

(8) When no counsel appears for one of the parties, only one counsel will be heard for the adverse party, but if a printed brief is filed without further appearance of counsel, then the adverse party will be entitled to be heard by two counsel. There is no authority for filing additional briefs after the hearing unless by special request of the court. *Detroit United R. Co. v. Nichols*, 91 C. C. A. 257, 165 Fed. 290.

For further discussion of briefs, reference is made to Simkins, *Federal Equity Suit*, 2d ed. pp. 751 to 753, chapter cxvi.

## CHAPTER XXV.

### HEARING IN APPELLATE COURT.

Assuming the writ of error has been perfected, the first and fundamental question is that of jurisdiction of the appellate court and the jurisdiction of the court from whence the appeal came. Fore River Shipbuilding Co. v. Hagg, 219 U. S. 177, 55 L. ed. 164, 31 Sup. Ct. Rep. 185, and cases cited. See Simkins, Federal Equity Suit, 2d ed. p. 755. The jurisdiction being apparent, the next question would be, What, in the state of the record, may be reviewed under the writ of error?

#### *What May be Reviewed.*

We must keep in mind, in discussing what may be reviewed by writ of error, that only questions of law are considered by the appellate court, and not law and fact, as in appeals in equity. Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co. 52 C. C. A. 95, 114 Fed. 134; Wichita R. & Light Co. v. Dulaney, 86 C. C. A. 397, 159 Fed. 417; Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502. And no question of law can be reviewed except those arising on the process, pleadings, or judgment, unless the facts have been found by a jury, or admitted by parties on a case stated. Erkel v. United States, 95 C. C. A. 151, 169 Fed. 623; Mason v. Smith, 112 C. C. A. 146, 191 Fed. 502; Campbell v. Boyreau, 21 How. 223, 16 L. ed. 96; Fellman v. Royal Ins. Co. 107 C. C. A. 637, 185 Fed. 689. And no ruling in the progress of the trial will be reviewed unless made a part of the record by a bill of exceptions embodying the objections made at the time and assigned as error. Ghost v. United States, 94 C. C. A. 253, 168 Fed. 842, and cases cited; Jackson v. Mutual L. Ins. Co. 108 C. C. A. 369, 186 Fed. 447; Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. 81 C. C. A. 76, 151 Fed. 466; Reader v. Haggin, 88 C. C. A. 91, 160 Fed. 909. We have, then, the rule that nothing is open for review where no facts are found, except the rul-

ings in the progress of the trial properly excepted to and assigned as error; or unless there is plain error. Rulings in the course of trial do not include "findings of fact," but are limited to the pleadings and their sufficiency. *Lehnen v. Dickson*, 148 U. S. 73, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; *Cooper v. Omohundro*, 19 Wall. 65, 22 L. ed. 47; *Grattan Twp. v. Chilton*, 38 C. C. A. 84, 97 Fed. 150; *United States Fidelity & G. Co. v. Woodson County*, 76 C. C. A. 114, 145 Fed. 151; *York v. Washburn*, 64 C. C. A. 132, 129 Fed. 564; *Hayden v. Ogden Sav. Bank*, 85 C. C. A. 558, 158 Fed. 91; *Fellman v. Royal Ins. Co.* 107 C. C. A. 637, 185 Fed. 689; *Bort v. McCutchen*, 109 C. C. A. 558, 187 Fed. 743; *Mason v. Smith*, 112 C. C. A. 146, 191 Fed. 503, and cases cited. Nor can the opinion be looked to for findings (see Opinion). Technical defects in pleadings, unless properly objected to in the trial court, should be disregarded if the case has been fairly tried. *Talcott v. Friend*, — L.R.A.(N.S.) —, 103 C. C. A. 80, 179 Fed. 676. By section 1011, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 715, it is provided that no reversal for error in ruling any plea in abatement, other than a plea to the jurisdiction, should be allowed. The inquiry, then, of the appellate court, is confined to the pleadings and proof as embodied in the bill of exceptions; and if regular and free from error, the case must be affirmed. *Reader v. Haggin*, 88 C. C. A. 91, 160 Fed. 909.

*Judgment of Nonsuit Reviewable.*

(See Final Judgment.) Such judgment is reviewable without exception. *Worthington v. McGough*, 112 C. C. A. 662, 192 Fed. 512.

*When Admission or Rejection of Evidence May be Reviewed.*

The admission or rejection of evidence cannot be reviewed unless the rulings were objected to at the time made, and incorporated in the record by a bill of exceptions seasonably taken, and error assigned; unless this is done the findings are conclusive. The bill of exceptions must also show the substance of the evidence admitted or rejected to which objection was made and exceptions reversed (see Bill of Exceptions). *Garrett v. Pope*

Motor Car Co. 94 C. C. A. 334, 168 Fed. 905; Cass County v. Gibson 46 C. C. A. 341, 107 Fed. 363; Lincoln Sav. Bank & S. D. Co. v. Allen, 27 C. C. A. 87, 49 U. S. App. 498, 82 Fed. 148, 149. Again, the ruling on evidence rests upon objections below, not on reasons given in the appellate court. Lilly v. Hamilton Bank, 29 L.R.A.(N.S.) 558, 102 C. C. A. 1, 178 Fed. 54. If point not presented below it cannot be assigned. Oregon R. & Nav. Co. v. Dumas, 104 C. C. A. 641, 181 Fed. 782. By rule 11 (all circuits) where the assignment of error is as to the admission or rejection of evidence, the assignment of error shall quote the full substance of the evidence admitted or rejected. When this is not done counsel will not be heard and the assignment will be disregarded (see post, p. 272; Lincoln Sav. Bank & S. D. Co. v. Allen, 27 C. C. A. 87, 49 U. S. App. 498, 82 Fed. 148), and the brief of plaintiff, when the substance of the evidence is given, must point out the pages of the record containing the evidence, as the court will not search for it. 27 C. C. A. 87. (See Brief.)

*When Giving or Rejecting a Charge May be Reviewed.*

We have seen that rule 11 (all circuits, see post, p. 272.) provides that when error is alleged to the charge of the court the assignment shall set out the part referred to *totidem verbis*; whether instructions given or refused. Errors not assigned according to this rule will be disregarded. Garrett v. Pope Motor Car Co. 94 C. C. A. 334, 168 Fed. 906 (See Assignment of Errors.) Cass County v. Gibson, 46 C. C. A. 341, 107 Fed. 363. So, general exceptions to a charge will not support specific errors assigned. Erie R. Co. v. Kennedy, 112 C. C. A. 76, 191 Fed. 332; Baltimore v. Maryland, 92 C. C. A. 335, 166 Fed. 641. And a general assignment that the court erred in its charge and in refusing to charge as requested are fatally defective in failing to state in what particular the court erred in its charge, and what particular request the court erred in refusing. Garrett v. Pope Motor Car Co. 94 C. C. A. 334, 168 Fed. 905; Baltimore v. Maryland, 92 C. C. A. 335, 166 Fed. 641; Erie R. Co. v. Kennedy, 112 C. C. A. 76, 191 Fed. 336. To form a right to review it must be sufficiently distinct and

specific to direct the attention of the court to the particular error complained of. *Coney Island v. Dennan*, 79 C. C. A. 375, 149 Fed. 692.

*When Facts May be Reviewed.*

The universal rule is that when the facts are tried by a jury, or by a judge without a jury under sections 649 and 700 of U. S. Rev. Stat., U. S. Comp. Stat. 1901, pp. 525-570, and general or special verdict is returned, it is conclusive in the appellate court; it can only be remedied in the court below by a motion for a new trial. *Lehnen v. Dickson*, 146 U. S. 73, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; *Union County Nat. Bank v. Ozan Lumber Co.* 103 C. C. A. 584, 179 Fed. 710; *Hayden v. Ogden Sav. Bank*, 85 C. C. A. 558, 158 Fed. 91; *York v. Washburn*, 64 C. C. A. 132, 129 Fed. 564; *Mason v. Smith*, 112 C. C. A. 146, 191 Fed. 502; *West Virginia N. R. Co. v. United States*, 67 C. C. A. 220, 134 Fed. 198; *J. W. Bishop Co. v. Shelhorse*, 72 C. C. A. 337, 141 Fed. 643, and cases cited. *Aetna L. Ins. Co. v. Ward*, 140 U. S. 91, 35 L. ed. 376, 11 Sup. Ct. Rep. 720; *Hamilton v. Loeb*, 108 C. C. A. 109, 186 Fed. 7. The appellate court, as a rule, cannot weigh evidence on writs of error. *Jackson v. Mutual L. Ins. Co.* 108 C. C. A. 369, 186 Fed. 447; *Toledo, St. L. & W. R. Co. v. Howe*, 112 C. C. A. 262, 191 Fed. 776. It must take facts as found. *Hamilton v. Loeb*, 108 C. C. A. 108, 186 Fed. 7; *Ware v. Wunder Brewing Co.* 87 C. C. A. 235, 160 Fed. 79, and cases cited; *Gage v. J. F. Smyth Mercantile Co.* 87 C. C. A. 377, 160 Fed. 429, and cases cited; *Hussey v. Richardson-Roberts Dry Goods Co.* 78 C. C. A. 370, 148 Fed. 602, and cases cited. However, if there is no substantial evidence to support the judgment, and the error is plain, the court may act on the want of evidence to support the judgment without exception taken. *Boatmen's Bank v. Trower Bros. Co.* 104 C. C. A. 314, 181 Fed. 806.

Again, where there is a special finding of the ultimate facts, the review may extend to a determination of the sufficiency to support the judgment and no exception is necessary. *Chicago, R. I. & P. R. Co. v. Barrett*, 111 C. C. A. 158, 190 Fed.

118; U. S. Rev. Stat. sec. 700; *Mason v. Smith*, 112 C. C. A. 146, 191 Fed. 502; *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 432, 187 Fed. 104. *Seeberger v. Schlesinger*, 152 U. S. 581, 38 L. ed. 560, 14 Sup. Ct. Rep. 729. So an agreed statement of facts is equivalent to a special finding for purposes of review (*Wilson v. Merchants' Loan & T. Co.* 39 C. C. A. 231, 98 Fed. 691, and cases cited; *Wayne County v. Kennicott*, 103 U. S. 554, 26 L. ed. 486; *Lehn v. Dickson*, 148 U. S. 73, 37 L. ed. 373, 13 Sup. Ct. Rep. 481), but if the question is as to the sufficiency of the evidence to support the finding, then it can only be revised by a seasonable exception (*Press v. Davis*, 4 C. C. A. 318, 9 U. S. App. 546, 54 Fed. 267; *Smith v. Sac County*, 11 Wall. 139, 20 L. ed. 102; *Fales v. New York L. Ins. Co.* 39 C. C. A. 38, 98 Fed. 234; *Mason v. Smith*, 112 C. C. A. 146, 191 Fed. 503, and cases cited; *National Surety Co. v. Cincinnati, N. O. & T. P. R. Co.* 76 C. C. A. 19, 145 Fed. 34. All circuits rule 11, post, p. 272; U. S. Rev. Stat. sec. 700.

The rule, then, may be stated that while it is settled that "special findings" or "an agreed statement of facts" may support a review as to their sufficiency to support the judgment, as before stated, yet it must be the ultimate facts," and not a mere statement of the evidence from which the facts to be established may be inferred; it must be an ultimate fact found, and not evidence for the appellate court to reach the ultimate fact. *Burnham v. North Carolina Street R. Co.* 23 C. C. A. 677, 46 U. S. App. 670, 78 Fed. 101; *Mutual Reserve Fund Life Asso. v. DuBois*, 29 C. C. A. 354, 56 U. S. App. 586, 85 Fed. 586; *National Surety Co. v. Cincinnati, N. O. & T. P. R. Co.* 76 C. C. A. 19, 145 Fed. 35, and cases cited. *Fellman v. Royal Ins. Co.* 107 C. C. A. 637, 185 Fed. 689; *Raimond v. Terrebonne Parish*, 133 U. S. 192, 33 L. ed. 309, 10 Sup. Ct. Rep. 57; *Streeter v. Chicago Sanitary Dist.* 66 C. C. A. 190, 133 Fed. 126, and cases cited. Nor can there be both a general and a special finding; it must be one or the other. 66 C. C. A. 190. Again, where the evidence is not contradictory in substantial points, the usual method of raising the issue as to the sufficiency of the evidence to support the judgment, and so to have the facts reviewed, is by each party asking an

instructed verdict (Union County Nat. Bank v. Ozan Lumber Co. 103 C. C. A. 584, 179 Fed. 712, and cases cited; Keeley v. Ophir Hill Consol. Min. Co. 95 C. C. A. 96, 169 Fed. 598, U. S. Rev. Stat. sec. 700, U. S. Comp. Stat. 1901, p. 570), provided the motion to instruct the verdict is seasonably excepted if overruled and incorporated in the record, and assigned as error. *Ibid.*

*To Determine the Sufficiency of the Evidence to Support the Judgment.*

A motion for an instructed verdict is necessary to review the evidence and determine its sufficiency to support the judgment. *Joplin & P. R. Co. v. Payne*, 194 Fed. 387. But a verdict on the whole case must be found by the jury and judgment entered thereon, and the record must show the verdict and judgment. The court cannot order a verdict on part of the issues and determine a part himself. *Bowman v. Atchison, T. & S. F. R. Co.* 106 C. C. A. 651, 184 Fed. 699. When a motion is made for an instructed verdict by both parties, it is in effect a submission of the case to the court on the facts (*Beuttell v. Magone*, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566; *Sena v. American Turquoise Co.* 220 U. S. 497, 55 L. ed. 559, 31 Sup. Ct. Rep. 488); and the appellate court must affirm if there be any facts to sustain the finding. But it is not the case that a motion to instruct submits the facts to the court; one may ask an instructed verdict on one phase of the evidence or of the case, and special instructions as to another phase of the case, in the event the court refuses to grant his motion to instruct. In such cases the right of trial by jury is not waived by asking the peremptory instruction. *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.* 210 U. S. 8, 52 L. ed. 936, 28 Sup. Ct. Rep. 607, 15 Ann. Cas. 70; *Minahan v. Grand Trunk Western R. Co.* 70 C. C. A. 463, 138 Fed. 37; *McCormick v. National City Bank*, 73 C. C. A. 350, 142 Fed. 132, 6 Ann. Cas. 544. The validity of the instructed verdict depends on whether the evidence was so conclusive as to make it the duty of the court to set it aside if submitted to the jury and a different verdict had been found. *McGuire v. Blount*, 199 U. S. 142-

148, 50 L. ed. 125-130, 26 Sup. Ct. Rep. 1, and cases cited; Marande v. Texas & P. R. Co. 184 U. S. 191, 46 L. ed. 495, 22 Sup. Ct. Rep. 340; Southern P. Co. v. Pool, 160 U. S. 440, 40 L. ed. 486, 16 Sup. Ct. Rep. 338.

*Where the Facts are Found by a Judge.*

By U. S. Rev. Stat. sec. 649, U. S. Comp. Stat. 1901, p. 525, issues of fact may be found by the judge without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury, the finding of the court having the same effect as the finding of a general or special verdict by a jury as to its conclusiveness in the appellate court. Where the facts are found by the judge, and there is not in the record a waiver of a jury, no question of evidence decided during the progress of the trial can be reviewed by the appellate court. Erkel v. United States, 95 C. C. A. 151, 169 Fed. 624, and cases cited. There is nothing left to review but the sufficiency of the complaint. Bond v. Dustin, 112 U. S. 604, 28 L. ed. 835, 5 Sup. Ct. Rep. 296; Dundee Mortg. & Trust Invest. Co. v. Hughes, 124 U. S. 157, 31 L. ed. 357, 8 Sup. Ct. Rep. 377; Columbus Compress Co. v. United States Fidelity & G. Co. 108 C. C. A. 465, 186 Fed. 488.

By U. S. Rev. Stat. sec. 700, U. S. Comp. Stat. 1901, p. 570, it is provided that when an issue of fact is determined without the intervention of a jury the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by bill of exceptions, may be reviewed on writ of error; and when the finding of fact is special, the review may extend to the sufficiency of the facts found to support the judgment. Under this section, when a case is tried by the court without a jury, we have seen that the findings of the court have the same effect as the verdict of a jury as to its conclusiveness in the appellate court. So a resulting judgment leaves nothing open for review but some plain error, and "the rulings of the court in the progress of the trial of the case" if seasonably excepted to and incorporated in the record; such as rulings upon evidence and the pleadings. Grattan Twp. v. Chilton,

38 C. C. A. 84, 97 Fed. 150; *Western U. Teleg. Co. v. Burgess*, 47 C. C. A. 168, 108 Fed. 26; *Eli Min. & Land Co. v. Carleton*, 47 C. C. A. 166, 108 Fed. 25; *Jackson v. Mutual L. Ins. Co.* 108 C. C. A. 369, 186 Fed. 449. So we have the rule that where the jury is waived, and the case is tried by the court, and judgment entered, unless there is an agreed statement of facts, or special findings of the ultimate facts, where the question of law as to their legal sufficiency is raised to sustain the court's judgment, the appellate court cannot review the case on its merits. *Fellman v. Royal Ins. Co.* 107 C. C. A. 637, 185 Fed. 690. It must limit its inquiry to the sufficiency of the complaint and of the rulings, if any be preserved, on question of law arising during the trial. *Lehnen v. Dickson*, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; *Streeter v. Sanitary Dist.* 66 C. C. A. 190, 133 Fed. 127. So, where the court has tried the case without the intervention of a jury, and no exceptions have been taken; while the findings of fact are conclusive, the court will notice an assignment that judgment should have been rendered for plaintiff on the pleadings. *Lehnen v. Dickson*, *supra*; *Jackson v. Mutual L. Ins. Co.* 108 C. C. A. 369, 186 Fed. 449.

So, again, a "special finding" made by a trial court when a jury is waived becomes a part of the record, and under U. S. Rev. Stat. sec. 700, the appellate court may determine its sufficiency to support the judgment without any exception having been taken below to the judgment, or any specific ruling made on the law involved. *Chicago, R. I. & P. R. Co. v. Barrett*, 111 C. C. A. 158, 190 Fed. 118-123, and cases cited. *Seeberger v. Schlesinger*, 152 U. S. 581, 38 L. ed. 560, 14 Sup. Ct. Rep. 729. Nor is an assignment of error necessary, as the court notice plain error without an assignment, as we have seen. *Memphis v. St. Louis & S. F. R. Co.* 106 C. C. A. 75, 183 Fed. 529; *United States v. Pena*, 175 U. S. 500, 44 L. ed. 251, 20 Sup. Ct. Rep. 165.

#### *Harmless Error.*

"Errors not affecting substantial rights should be disregarded." This is the basic test of harmless error; thus, where the

court directed a verdict on erroneous grounds the judgment will not necessarily be reversed, if it could have been properly directed on other grounds. *Whitney v. New York, N. H. & H. R. Co.* 50 L.R.A. 615, 43 C. C. A. 19, 102 Fed. 850; *Joslyn v. Cadillac Automobile Co.* 101 C. C. A. 77, 177 Fed. 866, citing *Currier v. Dartmouth College*, 54 C. C. A. 430, 117 Fed. 44; *Latting v. Owasso Mfg. Co.* 78 C. C. A. 183, 148 Fed. 369; *Wabash Screen Door Co. v. Lewis*, 106 C. C. A. 402, 184 Fed. 262. However, it is a rule of the Federal courts, that if error is apparent on the face of the record the presumption of prejudice arises, which cannot be disregarded unless the record affirmatively shows that the error was not prejudicial. The error that does not prejudice the rights of the complainant on a view of the whole case will not be regarded. *Cook v. Foley*, 81 C. C. A. 237, 152 Fed. 41; *United States v. Ute Coal & Coke Co.* 85 C. C. A. 302, 158 Fed. 20; *Armour & Co. v. Russell*, 6 L.R.A.(N.S.) 602, 75 C. C. A. 416, 144 Fed. 614; *Mutual Reserve L. Ins. Co. v. Heidel*, 88 C. C. A. 477, 161 Fed. 535; *Stewart v. Brune*, 102 C. C. A. 534, 179 Fed. 350; *Norfolk & P. Traction Co. v. Miller*, 98 C. C. A. 453, 174 Fed. 607; see *Press Pub. Co. v. Monteith*, 103 C. C. A. 502, 180 Fed. 356. Though the court proceeded on an erroneous theory, it will not be reversed if substantial justice has been done. *Aetna Indemnity Co. v. J. R. Crowe Coal & Min. Co.* 83 C. C. A. 431, 154 Fed. 545. So, erroneous admission of evidence which is clearly harmless will be disregarded (*Security Trust Co. v. Robb*, 73 C. C. A. 302, 142 Fed. 78); but it must exclude a reasonable doubt as to its prejudicial nature (*Inman Bros. v. Dudley & D. Lumber Co.* 76 C. C. A. 659, 146 Fed. 449). So, where the same facts are shown by proper evidence, or where admitted without objection. *Smith v. Au Gres Twp.* 9 L.R.A.(N.S.) 876, 80 C. C. A. 145, 150 Fed. 257; *Crichfield v. Julia*, 77 C. C. A. 297, 147 Fed. 65; *Columbia Box & Lumber Co. v. Drown*, 84 C. C. A. 269, 156 Fed. 459; *St. Louis Stave & Lumber Co. v. United States*, 100 C. C. A. 640, 177 Fed. 178; *Drumm-Flato Commission Co. v. Edmisson*, 208 U. S. 534, 52 L. ed. 606, 28 Sup. Ct. Rep. 367; *Delaware, L. & W. R. Co. v. Troxell*, 105 C. C. A. 593, 183 Fed. 373; *Nome Beach Lighterage & Transp. Co. v. Standard M. Ins. Co.* 156 Fed. 484, and cases cited, same case 92 C. C. A.

571, 167 Fed. 119; St. Louis & S. F. Co. v. Duke, 112 C. C. A. 564, 192 Fed. 306; Chesterfield Mfg. Co. v. Leota Mills, 194 Fed. 358. As to erroneous admission held harmless, see United States v. Whipple Hardware Co. 112 C. C. A. 357, 191 Fed. 945; Pratt v. North German Lloyd S. S. Co. 33 L.R.A. (N.S.) 532, 106 C. C. A. 445, 184 Fed. 303; Winters v. Chil-dress, 105 C. C. A. 544, 183 Fed. 577; Erie R. Co. v. Kennedy, 112 C. C. A. 76, 191 Fed. 332; Gong Nom Wood v. United States, 112 C. C. A. 346, 191 Fed. 830.

Rejecting evidence in chief is harmless when given in rebuttal. Chesterfield Mfg. Co. v. Leota Cotton Mills, 194 Fed. 358. Where evidence improperly admitted is readily separable, and was excluded by the court subsequently, it was considered harmless. Ware v. Pearsons, 98 C. C. A. 364, 173 Fed. 878; Chicago, M. & St. P. R. Co. v. Newsome, 98 C. C. A. 1, 174 Fed. 394; Armour & Co. v. Kollmeyer, 16 L.R.A. (N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78. But where the evidence is so impressive that in the opinion of the court, it has affected the verdict notwithstanding it was withdrawn from the jury, a new trial will be ordered. Armour & Co. v. Kollmeyer, 16 L.R.A.(N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78. So, where it is calculated to affect the determination of other issues, the error is not cured by the elimination of the question for which it was admitted. New York L. Ins. Co. Rankin, 89 C. C. A. 103, 162 Fed. 103; Knickerbocker Trust Co. v. Evans, 110 C. C. A. 347, 188 Fed. 449. So, where evidence improperly admitted was of value for a purpose other than that for which it was received, it is not harmless. Klander-Weldon Dyeing Mach. Co. v. Gagnon, 92 C. C. A. 204, 166 Fed. 286. Where the evidence erroneously excluded was cumulative it was harmless. Patterson v. Iaeger & S. R. Co. 102 C. C. A. 95, 178 Fed. 649. Where evidence is made immaterial by the charge of the court, it is harmless error to admit it. Western Bank Note & Engraving Co. v. Slentz, 110 C. C. A. 127, 188 Fed. 57; American Mfg. Co. v. Bigelow, 110 C. C. A. 77, 188 Fed. 34. Evidence not objected to, though erroneously admitted, is not ground for reversal; and when other evidence is admitted without objection, then the admission of evidence tending to prove the same fact, though objected to, would

be harmless. Western Bank Note & Engraving Co. v. Sleutz, *supra*. Where the trial is by the court, then evidence erroneously admitted is harmless, if the court decided the questions involved without reference to it. Sperry & H. Co. v. O'Neill-Adams Co. 107 C. C. A. 337, 185 Fed. 231.

The erroneous direction of a verdict is harmless error if final judgment has been rendered in State court between the same parties determining the questions in issue. Lamar v. Spalding, 83 C. C. A. 111, 154 Fed. 27.

Errors favorable to the complaining party are harmless. Hebrewon Mfg. Co. v. Powell Knitting Co. 96 C. C. A. 489, 171 Fed. 817.

So, errors in ruling on pleading will not be noticed when not materially affecting the justice of the case. Stewart v. Southern R. Co. 94 C. C. A. 171, 168 Fed. 685; Feidler v. Bartleson, 88 C. C. A. 194, 161 Fed. 30; Pacey v. McKinney, 60 C. C. A. 365, 125 Fed. 675.

So, an erroneous construction of a contract, by which a party was denied the right of recovery for a breach, where only nominal damages could be recovered, and no permanent right affected. Thomas China Co. v. C. W. Raymond Co. 67 C. C. A. 629, 135 Fed. 25; United States v. Withers, 65 C. C. A. 16, 130 Fed. 696. So error invited or acquiesced in will be disregarded. Winfrey v. Missouri, K. & T. R. Co. 194 Fed. 808-815. So, where case was tried on one theory, you cannot substitute another in the appellate court. Rule 11, all circuits (see post, p. 272).

#### *Effect of Reversal.*

Where the reversal is for error of law, and there is no dispute about the facts, judgment should be entered in the appellate court (Fellman v. Royal Ins. Co. 106 C. C. A. 557, 184 Fed. 577), but where reversal and facts are disputed, a new trial should be ordered (Newcomb v. Burbank, 182 Fed. 954).

#### *Rehearing in the Appellate Court.*

By all circuits rule 29 (see post, p. 306), the petition for re-

hearing can be presented only at the term of the entry of the judgment, unless by special leave granted during the term, and must be printed and grounds briefly stated, supported by the certificate of counsel. No argument unless a judge who concurred in the judgment requests it, and a majority of the court so determine. As to practice, see *Public Schools v. Walker*, 9 Wall. 603, 604, 19 L. ed. 650, 651; *Merchants' & M. Transp. Co. v. Robinson-Baxter Dissoway Towing & Transp. Co.* 194 Fed. 361.

### *Subsequent Appeals.*

Where the case is reversed, the decision on the issues in the appellate court becomes the law of the case in the retrial, and in a second appeal on the same issues (*Baldwin v. Chicago, R. I. & P. R. Co.* 192 Fed. 554; *Scatcherd v. Love*, 91 C. C. A. 639, 166 Fed. 53; *E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co.* 112 C. C. A. 153, 191 Fed. 543; *Beiseker v. Moore*, 98 C. C. A. 272, 174 Fed. 368; *Columbia Chemical Co. v. Duff*, 107 C. C. A. 200, 184 Fed. 876; *Higgins v. Eaton*, 188 Fed. 939. See *McCourt v. Singers-Bigger*, 80 C. C. A. 56, 150 Fed. 105; *National Surety Co. v. Kansas City Hydraulic Press Brick Co.* 104 C. C. A. 494, 182 Fed. 54), provided the facts remain substantially the same (104 C. C. A. 494). The rule is that every question of law or fact decided upon writ of error, whether in affirmance or reversal, is conclusively settled for the court below, in further proceedings on the case, and this is true, even though a different decision has been reached in the State court, and set up in a retrial of the case. *Messinger v. Anderson*, 96 C. C. A. 445, 171 Fed. 785; *Good v. Central Coal & Coke Co.* 95 C. C. A. 556, 170 Fed. 416; *St. Louis & S. F. R. Co. v. Cundeiff*, 107 C. C. A. 213, 184 Fed. 891, and cases cited (See *Simkins, Federal Equity Suit*, 2d ed. p. 797).

### *Mandate.*

By act of March 3, 1891, 26 Stat. at L. 829, chap. 517, sec. 10, U. S. Comp. Stat. 1901, p. 552, it is provided that whenever, on appeal or writ of error or otherwise, a case coming

directly from the district court to the Supreme Court shall be reviewed therein and determined, it shall be remanded to the district court for further proceedings to be taken in pursuance of such determination. Whenever the case comes from the circuit court of appeals to the Supreme Court, the cause when determined shall be remanded to the proper district court for further proceedings. Whenever the case on writ of error or appeal goes from the district court to the circuit court of appeals and is determined there in a case in which the circuit court of appeals' decision would be final, such cause shall be remanded to the trial court for further proceedings to be taken in pursuance of the determination. See Simkins, *Federal Equity Suit*, 2d ed. p. 791, chapter cxx., as to issue of, effect of, executing it, when court below wrongly construes mandamus as remedy (see all circuits rule 32, post, p. 311) as to issuing.

### *The Effect of the Mandate.*

The mandate being the final order of the appellate court in the case, it directs the court below as to further proceedings in accordance with the court's decision, as said in *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291, when a case has once been decided in the appellate court and remanded to the trial court, whatever was before the appellate court and disposed of by its decision is considered as finally settled. The district court is bound by the judgment as the law of the case, and must carry it into execution according to the mandate (*Simkins, Federal Equity Suit*, 2d ed. p. 793). The opinion delivered with the judgment may be consulted to ascertain what was intended by the mandate. If it is an affirmance, the district court cannot meddle with it, for any purpose but to carry it into execution; nor can it give any other relief, or review it even for apparent error; and the same rule applies where the case is reversed and rendered.

If the district court misconstrues the mandate its action may be controlled by a new appeal, or by mandamus if an appeal will not lie. (*Simkins, Federal Equity Suit*, 2d ed. p. 796.) If the case is reversed and sent back for a new trial, the de-

cision as expressed in the opinion and judgment of the appellate court becomes the law of the case, and must be applied in the new trial provided the facts remain substantially the same. The district court may proceed with any matter left open in the mandate. *Re Potts*, 166 U. S. 266, 267, 41 L. ed. 995, 996, 17 Sup. Ct. Rep. 520; *American Soda Fountain Co. v. Sample*, 70 C. C. A. 415, 136 Fed. 858; *Stewart v. Salomon*, 97 U. S. 361, 24 L. ed. 1045; *Ex parte Dubuque & P. R. Co. (Dubuque & P. R. Co. v. Litchfield)* 1 Wall. 69, 17 L. ed. 514. No appeal will be entertained from a judgment entered in the district court according to the mandate. *Merrill v. National Bank*, 24 C. C. A. 63, 41 U. S. App. 645, 78 Fed. 208; *Singer Mfg. Co. v. Adams*, 107 C. C. A. 658, 185 Fed. 768. Where a judgment denying defendant's motion for an instruction for a verdict at the close of the evidence was reversed, the decision was the law of the case on retrial, and unless the evidence presented a different state of facts the court below must grant a similar motion. *Toledo, St. L. & W. R. Co. v. Sellers*, 107 C. C. A. 114, 184 Fed. 885; *St. Louis & S. F. R. Co. Cundiff*, 107 C. C. A. 213, 184 Fed. 891; *Denver & R. G. R. Co. v. Arrighi*, 72 C. C. A. 400, 141 Fed. 67, where a mandate directed the court below to take such proceedings as according to right and justice ought to be had, it authorized the court, on ascertaining a mistake had been made in computation, to correct it. *Ex parte Marks*, 69 C. C. A. 80, 136 Fed. 168.

Where the mandate directed a new trial, an entry of judgment on the pleadings without taking testimony was held a trial. *Dodge v. United States*, 65 C. C. A. 603, 131 Fed. 849. Where the appellate court decides that a trial court should have submitted an issue to the jury, the trial court must submit the issue in a subsequent trial. *St. Louis & S. F. R. Co. v. Herr*, 193 Fed. 950.

#### *Recall of the Mandate.*

The circuit court of appeals has no power to recall its mandate after the term of the court in which the mandate was issued. *Waskey v. Hammer*, 102 C. C. A. 629, 179 Fed. 273, 95 C. C. A. 305, 170 Fed. 31; *Eadie v. Chambers*, 24 L.R.A.

(N.S.) 879, 96 C. C. A. 561, 172 Fed. 73, 18 Ann. Cas. 1096.  
(Simkins, Federal Equity Suit, 2d ed. p. 796.)

After the mandate has gone to the trial court, an application for delay to allow plaintiff in error to apply for a certiorari should be made to the district court, and not the appellate court. *Oceanic Steam Nav. Co. v. Watkins*, 110 C. C. A. 543, 188 Fed. 909.

## CHAPTER XXVI.

### LAWS OF A STATE AS RULES OF DECISION IN FEDERAL COURTS.

By U. S. Rev. Stat. sec. 721, U. S. Comp. Stat. 1901, p. 581, it is provided that the laws of the States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States where they apply. This act was passed in 1789, and at the same time the Federal courts were given concurrent jurisdiction with the State courts, and not subordinate to them in any way. In the exercise of comity and to avoid conflicts, the Federal courts have given a liberal construction to the act, to avoid any possibility of establishing different rules of property in the same State.

So, the rule has been firmly established that when the right of action rests upon a State law, or the decision of the highest judicial tribunal of the State (*Federal Lead Co. v. Suyers*, 88 C. C. A. 547, 161 Fed. 691) has fixed a rule of property or right which has become incorporated as a part of the local law, the Federal courts will yield their independent judgment and follow the State law or decision. In *Bucher v. Cheshire R. Co.* 125 U. S. 555-583, 31 L. ed. 795-799, 8 Sup. Ct. Rep. 974, it is said that the United States courts follow the highest judicial tribunal of a State when construing the Constitution and laws of such State, or where the decisions of the State courts have become rules of property, whether founded on a statute or not. It is further said the United States courts should follow the State courts in regard to rules of evidence in actions at law; also the common law of the State, when they have become fixed in the local law of the State by decisions of its courts; and also the Federal courts should follow all laws and customs of a local nature. *Snare & T. Co. v. Friedman*, — L.R.A. (N.S.) —, 94 C. C. A. 369, 169 Fed. 10-12: *Bucher v. Cheshire R. Co.* was decided in January, 1888. It notices the want of harmony in the cases in applying the act, and laid down, as

above stated, the rule to guide the subordinate courts and the decision has been a keynote in the harmony of Federal and State decisions since that time. Out of the multitude of decisions since, it is my purpose to state certain basic rules evolved therefrom, and which have been established to guide the Federal courts in the performance of the delicate duty of yielding their independent judgment to harmonize the administration of the law in the two jurisdictions. The rules are as follows:

(1) The construction of a State statute or a provision of a State Constitution by the highest court in the State will be followed. *Zeiger v. Pennsylvania R. Co.* 86 C. C. A. 69, 158 Fed. 809, same case 151 Fed. 348; *Maiorano v. Baltimore & O. R. Co.* 213 U. S. 272, 53 L. ed. 795, 29 Sup. Ct. Rep. 424; *Cheatham v. Evans*, 87 C. C. A. 576, 160 Fed. 802; *Western U. Teleg. Co. v. Julian*, 169 Fed. 166; *Johnson v. St. Louis*, 96 C. C. A. 617, 172 Fed. 31, 18 Ann. Cas. 949; *Hager v. American Nat. Bank*, 86 C. C. A. 334, 159 Fed. 396, 402; *Lewis v. Herrera*, 208 U. S. 309, 52 L. ed. 506, 28 Sup. Ct. Rep. 412; *Gatewood v. North Carolina*, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167; *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; *Delaware & H. Co. v. Yarrington*, 81 C. C. A. 522, 152 Fed. 396; *Joseph Dixon Crucible Co. v. Paul*, 93 C. C. A. 204, 167 Fed. 784; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *Carstairs v. Cochran*, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318; *Harrison v. Remington Paper Co.* 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314; *Nielson v. Chicago, B. & Q. R. Co.* 109 C. C. A. 225, 187 Fed. 393. Policy and wisdom of, not subject to review. *Hunter v. Pittsburgh*, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; *Kane v. Erie R. Co.* 68 L.R.A. 788, 67 C. C. A. 653, 133 Fed. 681.

It is conclusive only as to the express point decided. *Southern R. Co. v. Simpson*, 65 C. C. A. 563, 131 Fed. 705.

(2) The decisions of the highest court of the State that have become rules of property will control the Federal courts, if not in conflict with the national Constitution, treaties, or statutes. *Barker v. Eastman*, 192 Fed. 659; *Adelbert College v. Wabash R. Co.* 96 C. C. A. 465, 171 Fed. 811, 17 Ann. Cas.

1204, and cases cited; Beckwith v. Clark, 110 C. C. A. 207, 188 Fed. 172; Traer v. Fowler, 75 C. C. A. 540, 144 Fed. 810; Paine v. Willson, 77 C. C. A. 44, 146 Fed. 488; Kuhn v. Fairmont Coal Co. 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140; Converse v. Mears, 162 Fed. 771; Joseph Dixon Crucible Co. v. Paul, 93 C. C. A. 204, 167 Fed. 784; Sunset Teleph. & Teleg. Co. v. Pomona, 97 C. C. A. 251, 172 Fed. 829; United States v. Mason, 213 U. S. 115, 53 L. ed. 725, 29 Sup. Ct. Rep. 480; Debitulia v. Lehigh & W. Coal Co. 174 Fed. 886; Traer v. Fowler, 75 C. C. A. 540, 144 Fed. 810; Hoge v. Magnes, 29 C. C. A. 564, 56 U. S. App. 500, 85 Fed. 355; Johnson v. St. Louis, 96 C. C. A. 617, 172 Fed. 35, 18 Ann. Cas. 949, and cases cited; Spinello v. New York, N. H. & H. R. Co. 106 C. C. A. 189, 183 Fed. 762.

I will here note, as a matter of reference, conditions under which the rule has been applied:

The statute necessarily covers all the laws and decisions in the State in which the court is sitting, controlling or affecting the sale and transfer of property, real or personal, or contracts for the sale of property, situated in the State; also the laws and decisions affecting the title to property in the State or any interest therein, whether created by act of parties or the law, as where acquired by limitation. Scott v. Mineral Development Co. 64 C. C. A. 659, 130 Fed. 497; Fretts v. Shriver, 181 Fed. 279; Warburton v. White, 176 U. S. 496, 44 L. ed. 559, 20 Sup. Ct. Rep. 404, and cases cited; Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686; Western P. R. Co. v. Southern P. Co. 80 C. C. A. 606, 151 Fed. 376; Hubbird v. Goin, 70 C. C. A. 320, 137 Fed. 822.

So, the form and manner of the examination of married women in the conveyance of their separate estate. Gillespie v. Pocahontas Coal & Coke Co. 91 C. C. A. 494, 163 Fed. 992.

So, statutes of descent and distribution are followed. McPherson v. Mississippi Valley Trust Co. 58 C. C. A. 455, 122 Fed. 367; Yocom v. Parker, 67 C. C. A. 227, 134 Fed. 205; Hood v. McGehee, 189 Fed. 205.

Property rights created by statute are followed in the Federal bankruptcy courts. Re Burke, 168 Fed. 994; Southern P. Co. v. Western P. R. Co. 144 Fed. 160, 80 C. C. A. 606,

151 Fed. 376; *Bryant v. Swofford Bros. Dry Goods Co.* 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614; *Re Chaudron*, 180 Fed. 841; *Re First Nat. Bank*, 67 C. C. A. 536, 135 Fed. 62.

*Exemption laws.* The Federal courts follow the exemption laws of the State. *Re Baker*, 104 C. C. A. 602, 182 Fed. 392; *Re Camp*, 91 Fed. 745-749; *Re Sullivan*, 78 C. C. A. 505, 148 Fed. 815; *Bank of Nez Perce v. Pindel*, 193 Fed. 921.

*Mortgages and liens.* Statutes controlling mortgages and other liens on property in the State, both real and personal, control the Federal courts. *Omaha v. Omaha Water Co.* 112 C. C. A. 504, 192 Fed. 246; *Traer v. Fowler*, 75 C. C. A. 540, 144 Fed. 810; *Haggart v. Wilczinski*, 74 C. C. A. 176, 143 Fed. 22; *Hill v. Hite*, 29 C. C. A. 549, 56 U. S. App. 403, 85 Fed. 268; *Walter A. Wood Co. v. Eubanks*, 95 C. C. A. 273, 169 Fed. 929; *Wilson v. Perrin*, 11 C. C. A. 66, 22 U. S. App. 514, 62 Fed. 629, 631, and cases cited; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; *Dodge v. Norlin*, 66 C. C. A. 425, 133 Fed. 363; *Tygart Valley Brewing Co. v. Vilter Mfg. Co.* 107 C. C. A. 169, 184 Fed. 845.

So, unrecorded chattel mortgages follow the State laws and decisions construing their effect as liens (*Re Jules & F. Co.* 193 Fed. 536; *Re Huxoll*, 193 Fed. 857, and cases cited); and the creation of liens generally (*Re A. B. Baxter & Co.* 83 C. C. A. 106, 154 Fed. 22; *Morgan v. First Nat. Bank*, 76 C. C. A. 236, 145 Fed. 466; *Re Elletson Co.* 174 Fed. 859; *Re Grissler*, 69 C. C. A. 406, 136 Fed. 754; *Natural Carbon Paint Co. v. Fred Bredel Co.* 193 Fed. 897).

So, imposing charges on husband's estate in divorce case to support wife is governed by State laws. *Whitney v. Whitney Elevator & Warehouse Co.* 106 C. C. A. 28, 183 Fed. 678.

*Statute of frauds.* State statutes and decisions controlling the statute of frauds and its application are followed by the Federal courts. *Beckwith v. Clark*, 110 C. C. A. 207, 188 Fed. 171; *Walker v. Hafer*, 24 L.R.A.(N.S.) 315, 95 C. C. A. 311, 170 Fed. 39, and cases cited; *Lloyd v. Fulton*, 91 U. S. 485, 23 L. ed. 365.

*Tax laws.* The State construction of tax laws is followed. Singer Mfg. Co. v. Adams, 91 C. C. A. 461, 165 Fed. 877; Paine v. Willson, 77 C. C. A. 44, 146 Fed. 488; Hager v. American Nat. Bank, 86 C. C. A. 334, 159 Fed. 396; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; Hobe-Peters Land Co. v. Farr, 170 Fed. 644; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Henry F. Michell Co. v. Matthues, 134 Fed. 493; Moffitt v. Kelly, 218 U. S. 400, 54 L. ed. 1086, 30 L.R.A.(N.S.) 1179, 31 Sup. Ct. Rep. 79.

*Interest.* The Federal courts follow State laws governing interest. Bond v. John V. Farwell Co. 96 C. C. A. 546, 172 Fed. 59; U. S. Rev. Stat. sec. 966, U. S. Comp. Stat. 1901, p. 700.

*Corporations.* The Federal courts follow State laws regulating foreign corporations doing business in the State; also domestic corporations (Buffalo Refrigerating Mach. Co. v. Penn Heat & P. Co. 102 C. C. A. 196, 178 Fed. 696; Stone v. Southern Illinois & M. Bridge Co. 206 U. S. 267, 51 L. ed. 1057, 27 Sup. Ct. Rep. 615; Re Benedict Tea & Coffee Co. 192 Fed. 1011); or construing charters granted by the State (Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404); or the extent and powers of the corporation (Johnson v. St. Louis, 96 C. C. A. 617, 172 Fed. 31, 18 Ann. Cas. 949; Anglo-American Land, Mortg. & Agency Co. v. Lombard, 68 C. C. A. 89, 132 Fed. 721; Consumers' Gas Trust Co. v. Quinby, 70 C. C. A. 220, 137 Fed. 882); or State laws dissolving corporations (Re Munger Vehicle Tire Co. 87 C. C. A. 81, 159 Fed. 901; Ringling v. Hempstead, 193 Fed. 596).

Whether corporations are liable for damages for tort is controlled by State laws (Clark v. Atlantic City, 180 Fed. 601, and cases cited); but in the absence of a State statute the Federal courts will exercise their independent judgments (Illinois C. R. Co. v. Hart, — L.R.A.(N.S.) —, 100 C. C. A. 49, 176 Fed. 245); and where the question is as to exemplary damages the general law applies, and not State decisions (Norfolk & P. Traction Co. v. Miller, 98 C. C. A. 453, 174 Fed. 607).

*Fellow servants law.* The Federal courts follow State stat-

utes and decisions governing the law of fellow servants (*Atlantic Coast Line R. Co. v. Farmer*, 100 C. C. A. 244, 176 Fed. 692. See *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *United States Leather Co. v. Howell*, 80 C. C. A. 674, 151 Fed. 444; *Snipes v. Southern R. Co.* 91 C. C. A. 593, 166 Fed. 1); but not the common-law liability of masters for injuries by negligence of fellow servants (*Kinnear Mfg. Co. v. Carlilse*, 82 C. C. A. 81, 152 Fed. 933; *Jones v. Southern P. Co.* 75 C. C. A. 602, 144 Fed. 973, 7 Ann. Cas. 256; *Force v. Standard Silk Co.* 160 Fed. 992).

*Recovery for death loss.* The Federal courts must follow State statutes as to who may recover for death loss. *Fulco v. Schuylkill Stone Co.* 94 C. C. A. 498, 169 Fed. 98; *Quinette v. Bisso*, 5 L.R.A.(N.S.) 303, 69 C. C. A. 503, 136 Fed. 825; *Hollenbach v. Elmore & H. Contracting Co.* 174 Fed. 849, 877; *Maiorano v. Baltimore & O. R. Co.* 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424.

*Measure of damages.* The measure of damages for breach of contract is controlled by State laws and decisions. *Thorley v. Pabst Brewing Co.* 102 C. C. A. 522, 179 Fed. 338, same case 76 C. C. A. 87, 145 Fed. 117; *American Ice Co. v. Pocono Spring Water Ice Co.* 105 C. C. A. 625, 183 Fed. 193; *H. T. Smith Co. v. Minetto-Meriden Co.* 168 Fed. 777; *Power v. Augusta*, 191 Fed. 647. The measure of damage in tort when not governed by statute is one of general law. *Woldson v. Larson*, 90 C. C. A. 422, 164 Fed. 548.

*Regulations for protection of employees.* State laws requiring protection to employees are enforced by Federal courts (*Welsh v. Barber Asphalt Paving Co.* 93 C. C. A. 101, 167 Fed. 465); but injury occasioned by defective machinery or implements furnished is ordinarily a question of general law (*Patton v. Illinois C. R. Co.* 179 Fed. 530; *Salmons v. Norfolk & W. R. Co.* 162 Fed. 722).

*Assignments for benefit of creditors.* State laws governing assignments for the benefit of creditors and requiring accepting creditors to release will be followed by the Federal courts. *Robinson v. Belt*, 187 U. S. 41, 47 L. ed. 65, 23 Sup. Ct. Rep.

16. A State decision that creditors in a State attaching the debtor's property situated in that State, a receiver having been appointed in another State, have a superior claim to that of the receiver's right to the property attached, will be followed by the Federal courts. *Zacher v. Fidelity Trust & S. V. Co.* 45 C. C. A. 480, 106 Fed. 593. See 181 U. S. 621, 45 L. ed. 1032, 21 Sup. Ct. Rep. 924.

See, however, *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165, and *Belfast Sav. Bank v. Stowe*, 34 C. C. A. 229, 63 U. S. App. 14, 92 Fed. 100, as to equality of creditors, citizens of different States, to the funds of an insolvent.

(3) Rules of law of a local character, involving domestic customs and usages, are followed. *Converse v. Mears*, 162 Fed. 771; *Gardner v. Michigan C. R. Co.* 150 U. S. 357, 37 L. ed. 1109, 14 Sup. Ct. Rep. 140; *Russell v. Grigsby*, 94 C. C. A. 61, 168 Fed. 577.

We will now take up exceptions to the rule:

First. The first exception is contained in sec. 721, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 581, in the following words: "Except where the Constitution, laws, and treaties of the United States otherwise require or provide," and needs no citation of authority.

Another exception has been frequently stated as follows: "The State decision must have been based solely on the statute or some fixed rule of property of the State; otherwise, while the decision may be persuasive, it would not be controlling." *Adelbert College v. Wabash R. Co.* 96 C. C. A. 465, 171 Fed. 811, 17 Ann. Cas. 1204, and many cases cited.

Another exception has been recognized, as follows: to wit, when the decision of the State court as to the right involved was made after the right accrued, in such cases, though persuasive, it is not controlling. *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; *Shaw v. Cleveland, C. C. & St. L. R. Co.* 97 C. C. A. 520, 173 Fed. 750; *Onslow County v. Tollman*, 76 C. C. A. 317, 145 Fed. 753; *Wicomico County v. Bancroft*, 203 U. S. 112, 51 L. ed. 112, 27 Sup. Ct. Rep. 21.

To be obligatory the right must have accrued after the rule

had been established by the decision of the State court. *Shaw v. Cleveland, C. C. & St. L. R. Co.* 97 C. C. A. 520, 173 Fed. 746; *Adelbert College v. Wabash R. Co.* 96 C. C. A. 465, 171 Fed. 813, 17 Ann. Cas. 1204; *Jones v. Great Southern Fire-proof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, same case 54 C. C. A. 165, 116 Fed. 793, same case 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; *Kuhn v. Fairmont Coal Co.* 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140; *Hertford County v. Tome,* 82 C. C. A. 215, 153 Fed. 81; *Fleischmann Co. v. Murray,* 161 Fed. 162; *Murray v. Wilson Distilling Co.* 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458.

*The rule is not of force in the construction of general law.* The Federal courts may not renounce their independent judgment upon questions of general or commercial law, as we shall see. They determine for themselves the principles of the common law and general jurisprudence. *Pennsylvania R. Co. v. Hummel,* 92 C. C. A. 541, 167 Fed. 89-91, and cases cited; *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 62, 92 Fed. 868, 872; *Clark v. Bever,* 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468; *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. 101, 45 L. ed. 770, 21 Sup. Ct. Rep. 561; *Johnson v. St. Louis,* 96 C. C. A. 617, 172 Fed. 32, 18 Ann. Cas. 949; *Russell v. Grigsby,* 94 C. C. A. 61, 168 Fed. 580, and cases cited; *Three States Lumber Co. v. Blanks,* 69 L.R.A. 283, 66 C. C. A. 353, 133 Fed. 482; *First Nat. Bank v. Liewer,* 109 C. C. A. 70, 187 Fed. 16. As in the construction of a will (*Messinger v. Anderson,* 96 C. C. A. 445, 171 Fed. 785, see *Russell v. United States Trust Co.* 127 Fed. 445, same case 69 C. C. A. 410, 136 Fed. 758); in construction of a deed (*Dickson v. Wildman,* 105 C. C. A. 618, 183 Fed. 398) the Federal courts follow the settled law of the State as to words and phrases; in the construction of contracts generally (*Henderson v. Phillips,* 178 Fed. 375; *Mankato v. Barber Asphalt Paving Co.* 73 C. C. A. 439, 142 Fed. 329; *Gilbert v. American Surety Co.* 61 L.R.A. 253, 57 C. C. A. 619, 121 Fed. 499; *Keene Five Cent Sav. Bank v. Reid,* 59 C. C. A. 225, 123 Fed. 221; *Baltimore & O. R. Co. v. Thornton,* 110 C. C. A. 502, 188 Fed. 868; *Myrick v. Michigan C. R. Co.* 107 U. S. 102,

109, 27 L. ed. 325, 327, 1 Sup. Ct. Rep. 425) the Federal courts act independently of the State courts.

In *Sheppeny v. Stevens*, 177 Fed. 484, it is said that whether a contract is against public policy is a question of general law, upon which the Federal courts exercise their own judgment independent of State decisions. However, in *McCue v. Northwestern Mut. L. Ins. Co.* — L.R.A.(N.S.) —, 93 C. C. A. 71, 167 Fed. 435, it is decided that where the public policy of a State has been declared either by statute or fixed by decisions of the State's highest tribunal, it will be recognized in Federal courts as to contracts, and other matters governed by the laws of the State (*Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 100, 44 L. ed. 89, 20 Sup. Ct. Rep. 33; *Blackwell v. Southern P. Co.* 184 Fed. 489).

Federal courts follow the effect of Sunday laws on contracts as interpreted by the States (*Hill v. Hite*, 29 C. C. A. 549, 56 U. S. App. 403, 85 Fed. 268), or when the contract is the result of State law (*Sunset Teleph. & Teleg. Co. Pomona*, 97 C. C. A. 251, 172 Fed. 829). They follow the construction given to contracts by State courts as to the nature of the contract, as, for example, whether it was a lease or sale. *Re Sheets Printing & Mfg. Co.* 136 Fed. 989; *Unitype Co. v. Long*, 74 C. C. A. 453, 143 Fed. 315.

*The rule does not apply to commercial law.* It is the duty of the Federal courts to determine for themselves questions of commercial law. *Mutual L. Ins. Co. v. Lane*, 151 Fed. 280, 281, 85 C. C. A. 677, 157 Fed. 1002; *H. Scherer & Co. v. Everest*, 94 C. C. A. 346, 168 Fed. 827; *Johnson v. Charles D. Norton Co.* 86 C. C. A. 361, 159 Fed. 361; *Guernsey v. Imperial Bank*, — L.R.A.(N.S.) —, 110 C. C. A. 278, 188 Fed. 300–302; *Independent School Dist. v. Rew*, 49 C. C. A. 208, 111 Fed. 11, and cases cited; *Beckwith v. Clark*, 110 C. C. A. 207, 188 Fed. 171, 172; *Oates v. First Nat. Bank*, 100 U. S. 246 25 L. ed. 583; *Forrest v. Safety Bkg. & T. Co.* 174 Fed. 345; *Cudahy Packing Co. v. State Nat. Bank*, 67 C. C. A. 662, 134 Fed. 538; *First Nat. Bank v. Liewer*, 109 C. C. A. 70, 187 Fed. 16. Unless the State decisions are based on some local commercial law or custom having the force of law. *Re Hopper-Morgan Co.* 154 Fed. 249.

*When no construction of State law by State courts.* If there is no construction of the law involved, by State courts, the question is open to the independent judgment of the Federal courts. *Hamilton v. Loeb*, 179 Fed. 728; *Burgess v. Seligman*, 107 U. S. 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10. They are not required to await State construction. *Foster-Eddy v. Baker*, 192 Fed. 624.

*Rule does not apply to cases arising under the Federal Constitution and laws.* When the right arises under the Federal Constitution or Federal laws, State decisions cannot affect the independent judgment of the Federal court. *Johnson v. St. Louis*, 96 C. C. A. 617, 172 Fed. 35, 18 Ann. Cas. 949.

*Effect of the decision of the United States Supreme Court on subordinate Federal courts.* When the Supreme Court decides the identical question, subordinate Federal courts must follow without reference to State decisions. *Adelbert College v. Wabash R. Co.* 96 C. C. A. 465, 171 Fed. 806, 17 Ann. Cas. 1204; *Continental Securities Co. v. Interborough Rapid Transit Co.* 165 Fed. 947.

As to the Federal courts enforcing enlarged equitable remedies given by State statutes, see *Simkins, Federal Equity Suit*, 2d ed. The Federal courts enforce rights under State statutes whenever the State courts of general jurisdiction can enforce them; the Federal otherwise having jurisdiction. *Brun v. Mann*, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 145.

*The employers liability act.* The employers liability act was originally passed by Congress in 1906 (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1909, p. 1148), but was declared unconstitutional in 1908 (*Employer's Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141), because it made no distinction between employees engaged in intrastate and interstate commerce. Congress immediately after the decision, April 22, 1908, again passed the act, removing the objectionable clauses. The act greatly modifies the common-law action for damages for personal injuries to employees engaged in railroad service, especially as to the assumption of risk, and the application of the doctrine of contributory negligence. The statute was amended in 1910 (36 Stat. at L. p. 291, chap. 143, U. S.

Comp. Stat. Supp. 1911, p. 1324), particularly as to the venue of the suit.

*The statute abrogates State laws.* It has been generally held that these statutes abrogated all State laws, so far as they applied to employees of railroads injured while engaged in interstate commerce (*Fulgham v. Midland Valley R. Co.* 167 Fed. 660-662; *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Walsh v. New York, N. H. & H. R. Co.* 173 Fed. 495), following the rule firmly established in Federal jurisprudence, that, Congress having acted on the particular subject, State legislation must yield (*Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 99, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Southern P. Co. v. McGinnis*, 98 C. C. A. 403, 174 Fed. 649; *Sandigo v. Atchison, T. & S. F. Co.* 193 Fed. 877). Where, however, the action accrues under the statute it may be brought in the State court as well as the Federal court, and when brought in the State court it cannot be removed to the Federal court, as has been before stated. This denial of removal was an amendment to the act of 1910, cl. 6. Section 28, New Judicial Code.

In *Van Brimmer v. Texas & P. R. Co.* 190 Fed. 394, it is said that prohibiting the removal of a case brought in the State court under the employers liability act only applied where the action was brought under the act, and there was no other ground or jurisdiction upon which a removal could be applied for other than the Federal question that would be apparent because of the fact that the suit was based on a Federal act, so that if the suit has the further ground of diversity of citizenship, it can be removed. This case is certainly in conflict with both the letter and spirit of the act, and seems to stand by itself. The mandatory language of the act is, "that no case arising under this act and brought in a State court of competent jurisdiction shall be removed to any court of the United States" and it is said that a case arises under this act when the facts as alleged bring it within the terms of the statute. *Ullrich v. New York, N. H. & H. R. Co.* 193 Fed. 771.

The *Van Brimmer Case*, supra, has not been followed, but a contrary construction has been given to the act in subsequent cases. *Ullrich v. New York, N. H. & H. R. Co.* supra. *Saiek v. Pennsylvania R. Co.* 193 Fed. 303; *Hulac v. Chicago & N.*

W. R. Co. 194 Fed. 747; Lee v. Toledo, St. L. & W. R. Co. 193 Fed. 685.

*When Federal courts follow State courts in suits by employees.* The Federal courts apply State laws and decisions when the employee of a railroad is injured while employed in intrastate commerce, or when engaged in any other character of employment within the State where the injury occurs. Pennsylvania Steel Co. v. Lakkonen, 104 C. C. A. 513, 181 Fed. 326; Van Brimmer v. Texas & P. R. Co. 190 Fed. 397; New England Nav. Co. v. Luliano, 192 Fed. 552; Erie R. Co. v. White, 109 C. C. A. 322, 187 Fed. 556; United States Gypsum Co. v. Sliwienska, 106 C. C. A. 38, 183 Fed. 689; Proctor & G. Co. v. Williams, 106 C. C. A. 45, 183 Fed. 695.

The rules as above stated apply to the Federal hours of service act. Also the Federal safety appliance act. Chicago, R. I. & P. R. Co. v. Brown, 107 C. C. A. 300, 185 Fed. 82, 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174.

*Costs.* There are no Federal statutes defining a successful party in a civil action who may recover costs at law; therefore the State statutes are followed. U. S. Rev. Stat. sec. 721, U. S. Comp. Stat. 1901, p. 581; Scatcherd v. Love, 91 C. C. A. 639, 166 Fed. 53.

So, a motion for security for costs. Winkley Co. v. Bowen Mfg. Co. 180 Fed. 624. By U. S. Rev. Stat. sec. 968, U. S. Comp. Stat. 1901, p. 702, the recovery of costs is conditioned on the amount recovered when below the jurisdiction of the court.

In taxing costs, secs. 823, 983, U. S. Rev. Stat., U. S. Comp. Stat. 1901, pp. 632, 706, must be followed. Richter v. Magone, 47 Fed. 192; see Hoystadt v. Delaware, L. & W. R. Co. 182 Fed. 882. There is a Federal law as to costs *in forma pauperis* (sec. 1823). By section 977, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 704, it is provided that where several actions are brought where parties may have been joined in one suit, the costs are limited to one suit. See also section 921, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 685. Costs usually cover fees of clerk, marshal, and attorney authorized by law, amount paid printers, and fees authorized for exemplification and copies of papers used in trials; also fees and allowance to witnesses. You may tax costs for witnesses to any point to which

a subpoena can run; so, where the witness lived beyond a hundred miles from the place of trial, the marshal is not entitled to the costs for serving process. *United States v. Southern P. Co.* 172 Fed. 909.

Where there is no rule of court authorizing the printing of any of the proceedings, then the cost of printing cannot be added, unless the court in the particular case ordered it done; but where a rule of court requires the record to be printed, then it becomes a legitimate item of costs. *Luxfer Prism Patents Co. v. Elkins*, 99 Fed. 29; *Gird v. California Oil Co.* 60 Fed. 1011; *Lee v. Simpson*, 42 Fed. 434; *Ferguson v. Dent*, 46 Fed. 88. The bill of costs must be verified before approval by the court. *Jerman v. Stewart*, 12 Fed. 271; *Chiatovich v. Hanchett*, 93 Fed. 727.

*On writ of error.* Plaintiff in error reversing the case is entitled to recover costs paid. *Scatcherd v. Love*, 91 C. C. A. 639, 166 Fed. 54, U. S. Rev. Stat. sec. 1010, U. S. Comp. Stat. 1901, p. 715. Supreme Court rules 20-38 (see post, pp. 251-260).

To authorize the district court to issue execution for costs on appeal the mandate from the appellate court should order it. *American Trust & Sav. Bank v. Zeigler Coal Co.* 165 Fed. 512; U. S. Rev. Stat. sec. 701, U. S. Comp. Stat. 1901, p. 571; and act of March 3, 1891, 26 Stat. at L. 829, chap. 517, U. S. Comp. Stat. 1901, p. 552; Supreme Court rule 24, cl. 6; all circuits rule 31, cl. 5. See post, pp. 254, 308.

Where the clerk of the court makes out the record for the writ of error, he can charge 15 cents a folio under U. S. Rev. Stat. sec. 828, U. S. Comp. Stat. 1901, p. 635 (*Hoysradt v. Delaware, L. & W. R. Co.* 182 Fed. 880-882, and cases cited), and the clerk may demand the costs in advance. *Id.* See also all circuits rule 31, cl. 3, post, p. 308.

As to costs on dismissal see Supreme Court rule 24, cls. 1, 2, post, p. 253, and all circuits rule 31, cl. 3, post, p. 308. *Citizens' Bank v. Cannon*, 164 U. S. 324, 41 L. ed. 453, 17 Sup. Ct. Rep. 89.

*When judgment for costs appealable.* See Final Judgment; and see also *Scatcherd v. Love*, 91 C. C. A. 639, 166 Fed. 53; *Bluegrass Canning Co. v. Steward*, 99 C. C. A. 159, 175 Fed. 538.

# APPENDIX.

## RULES

OF THE

### UNITED STATES SUPREME COURT.

Adopted December 22, 1911, with later amendments.

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#### 1.

#### CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the national government, and he shall not practice, either as attorney or counsel, or in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court, except as provided by rule 10.

#### 2.

#### ATTORNEYS AND COUNSELORS.

1. It shall be requisite to the admission of attorneys or counselors to practice in this court, that they shall have been such for three years past in the highest courts of the States to which they respectively belong, and that their private and professional characters shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, *viz.*:

I, ..... do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

## 3.

## PRACTICE.

This court considers the former practice of the courts of King's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

## 4.

## BILL OF EXCEPTIONS.

The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.

## 5.

## PROCESS.

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney general of such State.

3. Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

## 6.

## MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. Forty-five minutes on each side shall be allowed to the argument to a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly postpaid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motions as is provided for in cases of motions to dismiss under paragraph 4 of this rule.

6. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may nevertheless, if the conclusion is arrived at that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to a summary docket. The hearing of the causes on such docket will be expedited, the court providing from time to time for such speedy disposition of the docket as the regular order of business may permit, and on the hearing of such causes one-half hour will be allowed each side for oral argument.

7. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

## 7.

## LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also \$1 per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by anyone except the justices of the court.

## 8.

## WRIT OF ERROR AND APPEAL, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

In order to enable the clerk to perform such duty, and for the purpose of reducing the size of transcripts of record in cases brought to this court by appeal or writ of error, by eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant or plaintiff in error or his attorney to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee or defendant in error, or his counsel, a praecipe which shall indicate the portions of the record to be incorporated into the transcript of the record on such appeal or writ of error. Should the appellee or defendant in error, or his counsel, desire additional portions of the record incorporated into the transcript of the record to be filed in this court, he shall file with the clerk of the lower court his praecipe also, within ten days thereafter (unless the time shall be enlarged by a judge of the lower court or by a justice of this court), indicating such additional portions of the record desired by him.

The clerk of the lower court shall transmit to this court as the tran-

script of the record in the case only the portions of the record below designated by both parties as above provided.

The parties or their counsel, however, may agree by written stipulation to be filed with the clerk of the lower court the portions of the record which shall constitute the transcript of record on appeal or writ of error, and the clerk in such case shall transmit only the papers designated in such stipulation.

If this court shall find that portions of the record unnecessary to a proper presentation of the case have been incorporated into the transcript by either party, the court may order that the whole or any part of the clerk's fee for supervising the printing and of the cost of printing the record be paid by the offending party.

2. In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day, except in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii, and Porto Rico, when the time shall be extended to sixty days, and from the Philippine Islands to one hundred and twenty days.

6. The record in cases of admiralty and maritime jurisdiction, when, under the requirements of law, the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

9.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket

the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

## 10.

### PRINTING RECORDS.

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk for the payment of his fees as he may require, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, the case shall be dismissed.

3. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under rule 8, § 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed

copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under rule 24, § 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

## 11.

### TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made un-

der the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will order that a translation be supplied and inserted in the record.

## 12.

## FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

## 13.

## OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

## 14.

## CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

## 15.

## DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personality or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error or appellee, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error or appellant, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, that a copy of every such order shall be printed in some newspaper of general circulation within the state, territory, or district from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in such court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or territory of the United States, and stating therein the name and character of such representative, and the State or territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain

an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decrees reversed, if the same be erroneous: Provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, that in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate: And provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

**16.**

**NO APPEARANCE OF PLAINTIFF IN ERROR OR APPELLANT.**

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant in error or appellee may have the plaintiff in error or appellant called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

**17.**

**NO APPEARANCE OF DEFENDANT IN ERROR OR APPELLEE.**

Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant, and to give judgment according to the right of the case.

**18.**

**NO APPEARANCE OF EITHER PARTY.**

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

**19.**

**NEITHER PARTY READY AT SECOND TERM.**

When a case is called for argument at two successive terms, and upon

the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

## 20.

## PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the court of claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but thirty copies of the arguments, signed by attorneys or counselors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

## 21.

## BRIEFS.

1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least three weeks before the case is called for argument, thirty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to

*totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk thirty printed copies of his argument, at least one week before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

7. No brief or printed argument, required by the foregoing sections, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party.

"8. Every brief of more than twenty pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited."

As amended April 1, 1912.

## 22.

### ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One and one-half hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the

argument begins. But in cases certified from the circuit court of appeals, cases involving solely the jurisdiction of the court below, and cases under the act of March 2, 1907, 34 Stat., 1246, forty-five minutes only on each side will be allowed for the argument unless the time be extended. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

## 23.

### INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.
2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, shall be awarded upon the amount of the judgment.
3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.
4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

## 24.

### COSTS.

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when the costs incident to the motion to dismiss shall be allowed.
2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.
3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.
4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, \$5.

For entering an appearance, 25 cents.

For entering a continuance, 25 cents.

For filing a motion, order, or other paper, 25 cents.

For entering any rule, or for making or copying any record or other paper, 20 cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, \$1.

For entering a judgment or decree, \$1.

For every search of the records of the court, \$1.

For a certificate and seal, \$2.

For receiving, keeping, and paying money in pursuance of any statute or order of court, 2 per cent on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, \$10.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, 15 cents per folio; but when the necessary printed copies of the record, as printed for the use of the lower court, shall be furnished, the fee for supervising shall be 5 cents per folio.

For making a manuscript copy of the record, when required under rule 10, 20 cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, \$5.

For a mandate or other process, \$5.

For filing briefs, \$5 for each party appearing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, \$2.

## 25.

### OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be printed. And it shall be the

duty of the clerk to cause the same to be forthwith printed, and to deliver a copy to the reporter as soon as the same shall be printed.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded.

## 26.

### CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall be continued to the next term of the court unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may also, by leave of the court, be advanced on motion of the Attorney General.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

9. If, after a case has been passed, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that un-

der argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

## 27.

### ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

## 28.

### DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

## 29.

### SUPERSEDEAS.

Supersedeas bonds in the district courts and circuit courts of appeals must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in

all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

## 30.

## REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

## 31.

## FORM OF PRINTED RECORDS AND BRIEFS.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

## 32.

## WRITS OF ERROR AND APPEALS IN CASES INVOLVING JURISDICTION OF LOWER COURT.

Cases brought to this court by writ of error or appeal, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by rule 6, in regard to motions to dismiss writs of error and appeals.

## 33.

## MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to

notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them or make such other disposition of them as to him may seem best.

## 34.

## CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

## 35.

## ASSIGNMENT OF ERRORS.

1. Where an appeal or a writ of error is taken from a district court direct to this court, under § 238 of the act entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911, chapter 231, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of error shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of §§ 2, 3, 4, 5, 6, and 9, of rule 10.

## 36.

## APPEALS AND WRITS OF ERROR FROM DISTRICT COURTS.

1. An appeal or a writ of error from a district court direct to this court, in the cases provided for in §§ 238 and 252 of the act entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911, chapter 231, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge assigned to the district court, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under § 238, the district court, or any judge thereof, or any justice of this court, or any circuit judge assigned to the district court, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

As amended February 26, 1912.

## 37.

## CASES FROM CIRCUIT COURTS OF APPEALS.

1. Where, under § 239 of the act entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911, chapter 231, a circuit court of appeals shall certify to this court a question or proposition of law concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be set up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where an application is submitted to this court for a writ of certiorari to review a decision of a circuit court of appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed. The petition shall contain only a summary and short statement of the matter involved, and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same, shall be served on the

counsel for the respondent at least two weeks before such date in all cases except where the counsel to be notified resides west of the Rocky mountains, in which cases the time shall be at least three weeks. The brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition. Oral argument will not be permitted on such petitions, and no petition will be received within three days next before the day fixed upon for the adjournment of the court for the term.

As amended June 10, 1912.

### 38.

#### INTEREST, COSTS, AND FEES.

The provisions of rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of §§ 238, 239, 240, and 241 of the act entitled "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911, chapter 231.

### 39.

#### MANDATES.

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

### 40.

#### PRACTICE IN CASES FROM CIRCUIT COURTS OF APPEALS.

The provisions of these rules relating to the practice on direct writs of error to and appeals from the district courts shall also be deemed to relate to and cover the practice on writs of error to and appeals from the circuit courts of appeals.

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# RULES OF THE UNITED STATES CIRCUIT COURTS OF APPEALS.

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## MODE OF STATEMENT.

The rules of the United States circuit courts of appeals as adopted in each of the nine circuits are so nearly alike that but one statement of a rule is made where it is common to all the circuits. Where they differ in different circuits the variance is shown either by a repetition of the rule as it exists in the several differing circuits, or by an explanation at the foot of the rule. Rules in addition to the thirty-four which are nearly identical, which have been adopted by some of the circuits, are stated separately by circuits at the foot of the general rules.

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### 1.

#### NAME.

The court adopts "United States Circuit Court of Appeals for the First Circuit" as the title of the court.

[In the other circuits the word "First" preceding "circuit" is replaced with "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," and "Ninth," respectively.]

In the eighth circuit the following provision is made by the act of March 30, 1911:

"It is further ordered that where the district court is specifically named in any rule, the provisions thereof shall also apply to the circuit court, so far as the same may be applicable, until such circuit courts shall be abolished by operation of law."]

### 2.

#### SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "First Circuit" in two lines, in the centre, with a dash beneath; as follows:

[Seal.]

[In the other circuits the word "first" preceding "Circuit" and the word "First" on the seal, are replaced by the words "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," and "Ninth," respectively.]

## 3.

## TERMS AND SESSIONS.

**First circuit**—One term of this court shall be held annually at the city of Boston at ten o'clock in the forenoon on the first Tuesday of October. Stated sessions thereof shall be there held at the same hour on the first Tuesday of every month, and may be adjourned to such times and places as the court may from time to time designate. But, unless otherwise ordered, any adjournment shall be held to have been made to the first day of the next stated session.

[As amended October Term, 1891, September 15, 1892.]

**Second circuit**—One term of this court shall be held annually at the city of New York on the last Tuesday of October, and shall be adjourned to such times and places as the court may from time to time designate.

**Third circuit**—Terms of this court shall commence and be held on the first Tuesday in March and the first Tuesday in October at the city of Philadelphia.

(Promulgated June 15, 1904.)

**Fourth circuit**—1. There shall be held in the city of Richmond, Virginia, three regular terms of this court; one on the first Tuesday of February, one on the first Tuesday of May, and one on the first Tuesday of November, in each year.

2. Special sessions of this court shall be held at Richmond, Virginia, on the second Tuesday of every month of the year, except in those months in which regular terms of the court are held. During said sessions such orders, judgments, or decrees as may be necessary concerning pending cases may be considered and disposed of, opinions in cases theretofore argued may be filed, and decrees and judgments relating thereto entered, mandates issued, and any such further action taken as is authorized by the statute in such case made and provided.

3. If at any such special session no judge shall be in attendance, the clerk shall adjourn the court until the next day, or to such time as the senior circuit judge shall direct, and, then in case no direction be made, to the next session or term of the court.

(Promulgated April 1, 1912.)

**Fifth circuit**—A session of this court shall be held annually at the city of Atlanta, Georgia, on the first Monday in October; at the city of Montgomery, Alabama, on the third Monday in October; at the city of Fort Worth, Texas, on the first Monday in November; at the city of New Orleans, Louisiana, on the third Monday in November; and shall be adjourned to such other time and place as the court may from time to time order and designate.

(Promulgated January 12, 1905).

**Sixth circuit—TERMS, HEARING, AND CONTINUING OF CASES.**

1. One term of this court shall be held annually on the Tuesday after the first Monday of October, and adjourned sessions on the Tuesday after the first Monday of each other month in the year except August and September. At the July session no causes will be heard, except upon special order of the court.

A printed docket containing all cases docketed and not heard shall be made by the clerk for the October, January, and April sessions.

2. All sessions of the court shall be held at Cincinnati, unless otherwise specially ordered by the court.

3. The court, on the first day of each session, except the July session, will begin calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the session in the same way.

4. If the parties, or either of them, shall be ready when the case is called, the same will be heard, provided that the time within which to file briefs has expired.

But a case may be continued once by agreement of counsel in open court, or by stipulation filed in the clerk's office, to any session during the term. Subsequent continuances must be made by the court on motion for cause shown; and engagements of counsel in other courts will not be considered good cause for continuance.

5. Each day's calendar shall consist of the six cases next in order after the case last submitted on the previous day, but the calendar will not include any case continued or passed by the court or stipulation of counsel before the adjournment of court on the previous day. The calendar for each day shall be exhibited in the clerk's office at the adjournment of court on the previous day. Counsel choosing to rely on the judgment of the clerk as to the probable time of hearing of any case, otherwise than as shown in the day's calendar above provided for, must do so at their own risk.

6. Two or more cases involving the same question may by leave of the court or by its order be heard together, but they must be argued as one case.

7. For good cause shown, on motion of either party, the court may advance any cause upon the docket to be heard at any session, even though the time permitted under the rules for the filing of briefs may not have expired at the day set for hearing. Such motion for the advancement of causes will be heard only upon five days' previous notice to opposing counsel.

(Promulgated December 2, 1902.)

**Seventh circuit—**A term of this court shall be held annually, at the city of Chicago on the first Monday in October, and continue until the first Monday in October of the succeeding year. Every term shall be adjourned to such times and places as the court may from time to time designate. Unless otherwise specially ordered, the court will hold three sessions for the hearing of causes during each term, beginning on the first Monday in

October, the first Monday in January, and the first Monday in May, respectively.

**Eighth circuit—1.** Three terms of this court will be held annually, one at the city of St. Paul on the first Monday of May, one at the city of Denver on the first Monday of September, and one at the city of St. Louis on the first Monday of December.

2. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas and Oklahoma in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of April, and cases from Colorado, Utah, Wyoming and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the May term in St. Paul are filed on or before the 1st day of April, and those only, will be heard at the succeeding May term of the court in St. Paul.

3. Cases from Colorado, Wyoming, Utah and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of July and cases from the remainder of the circuit in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the September term in Denver are filed on or before the 1st day of July, and those only, will be heard at the succeeding September term in Denver.

4. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas and Oklahoma in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of October, and cases from Colorado, Wyoming, Utah and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations

of the parties for their hearing at the December term in St. Louis are filed on or before the 1st day of October, and those only, will be heard at the succeeding December term in St. Louis.

5. These terms of the court may be adjourned to such times and places as the court may from time to time designate.

(Promulgated March 30, 1911.)

Ninth circuit—One term of this court shall be held annually at the city of San Francisco on the first Monday of October, and shall be adjourned to such times and places as the court may from time to time designate.

#### 4.

##### QUORUM.

1. If, at any term, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time,\* or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

This rule was amended in the First Circuit October 4, 1898, by directing that, in the absence of all the judges and the clerk, the marshal or his deputy might adjourn the court from day to day.

[\*In the fourth circuit, the words "or from place to place," are here inserted.]

#### 5.

##### CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court, at which a term shall be held annually.

2. The clerk shall not practise, either as attorney or counselor, in this court or in any other court, while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by § 794 of the Revised Statutes, and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from this court room or from the office, without an order from the court.

[Section 1 of this rule in the fourth circuit provides that the clerk's office shall be kept at Richmond, Virginia; in the fifth circuit it provides that the clerk's office shall be kept in the city of New Orleans, and in the ninth circuit that the clerk's office shall be kept in San Francisco, California, and section 3 of this rule in the fifth circuit provides that the bond shall be in the sum of ten thousand dollars (\$10,000), instead of in a sum to be fixed; and the words "except as provided in Rule 23," are added to section 4 of this rule in the ninth circuit.

Section 1 of this rule in the seventh circuit provides that the clerk's office shall be kept at Chicago, and there is added to it the following:

5. All fees collected by the clerk, which are not properly taxable as costs in any case, and which are not by law required to be by him deposited in the Treasury of the United States, shall constitute a fund to be expended by the clerk, under the direction of the court, in the purchase of law books for the library of the court.

6. The clerk shall keep an accurate and itemized account of all moneys received by him officially, including costs and fees in cases in the court and fees and moneys collected on any account whatever, and shall deposit the same as received daily to his credit as clerk, and separately from all individual accounts, in a national bank designated by the senior judge, and at the end of each month, and whenever required by the court or senior judge, shall submit to the senior judge a detailed report showing by items all moneys received and all moneys paid out during the month, and the total balances on hand from each and all sources of receipt; each report shall be accompanied by a statement, over the signature of the cashier or other officer of the bank of which the deposit is kept, of the amount in the bank to the credit of the clerk at the close of the last day included in the report.]

## 6.

### MARSHAL, CRIER, AND OTHER OFFICERS.

First circuit—The marshal shall be in attendance during the sessions of the court, with such number of bailiffs, messengers, and other officers as the court may from time to time order.

[As amended at the October Term, 1891, Sept. 15, 1892.]

Second, third, and seventh circuits—1. Every marshal and deputy marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by § 782 of the Revised Statutes, and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed, and with sureties to be approved, by the court, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

Fourth, fifth, eighth, and ninth circuits—The marshal\* and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

[\*In the eighth circuit the words "of the district in which a term or session of the court is held" are here inserted.]

**Sixth circuit**—1. The crier and bailiffs of the court shall, before they enter on their duties, take an oath in the form prescribed by § 782 of the Revised Statutes.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

[As amended October 22, 1894.]

## 7.

### ATTORNEYS AND COUNSELORS.

**First and second circuits**—All attorneys and counselors admitted to practise in the Supreme Court of the United States, or in any circuit court of the United States, shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor.

**Third circuit**—All attorneys and counselors admitted to practise in the Supreme Court of the United States or in any circuit court of the United States shall become attorneys and counselors in this court, on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor, and all attorneys and counselors of the circuit court of the United States for the third circuit shall be attorneys and counselors of this court without taking any further oath.

**Fourth circuit**—All attorneys and counselors admitted to practise in the Supreme Court of the United States, or in any District Court of the United States shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States, subscribing the roll, and paying to the clerk a fee of \$5.

(Promulgated April 1, 1912.)

**Fifth circuit**—All attorneys and counselors admitted to practise in the Supreme Court of the United States, or in any circuit court of the United States, upon filing certificate of such admission with the clerk of this court, and upon taking an oath or affirmation in the following form, *viz.*:

"I, . . . . ., do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court uprightly and according to law, and that I will support the Constitution of the United States" (a copy of which shall also be filed with the clerk), shall become attorneys and counselors of this court; provided, however, that any attorney or counselor eligible to admission as an attorney and counselor of this court may be admitted to practice, on motion, in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll.

No fees shall be charged by the clerk under this rule.

[As amended Nov. 23, 1893.]

**Sixth circuit**—All attorneys and counselors permitted to practise in the Supreme Court of the United States or in any circuit court of the United States shall become attorneys and counselors in this court on taking an oath or affirmation as prescribed by rule 2 of the Supreme Court of the United States, and upon subscribing the roll.

The fee for such admission shall be \$10, in accordance with the table or fees as prepared by the Supreme Court of the United States.

Every person taking the oath and paying such fee shall be entitled to a certificate of his admission, signed by the clerk.

**Seventh circuit**—All attorneys and counselors admitted to practise in the Supreme Court of the United States or in any circuit court of the United States shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States, and on subscribing the roll. The clerk shall be entitled to a fee of \$10 for each such admission, and a certificate thereof in accordance with the table of fees prepared by the Supreme Court of the United States.

**Eighth circuit**—1. All attorneys and counselors admitted to practise in the Supreme Court of the United States or in any circuit court or district court of the United States, or in the supreme court of any State in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

2. And any attorney and counselor admitted to practise in the Supreme Court of the United States or in the supreme court of any State or in the district or circuit courts of the United States for this circuit, may be admitted by order of this court to practice and may be enrolled as an attorney and counselor of this court, thirty days after he furnishes to the clerk of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts; and upon subscribing and forwarding to the clerk the following oath: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of the circuit court of appeals for the eighth circuit, uprightly and according to law; and that I will support the Constitution of the United States. So help me God."

(Promulgated March 30, 1911.)

**Ninth circuit**—All attorneys admitted to practise in the Supreme Court of the United States, or in any circuit court of the ninth circuit, shall be deemed attorneys of the circuit court of appeals for the ninth circuit; but such attorneys, on or before their first appearance in open court, shall take an oath or affirmation, in the form prescribed by rule 2 of the Supreme Court of the United States and subscribe the roll of attorneys. All other persons who have been admitted to practise in the highest court of any State or Territory, upon presenting satisfactory evidence of good moral character and fair professional standing, may be

admitted to practise in said court upon taking the oath so prescribed and subscribing the roll of attorneys.

8.

PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

9.

PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

10.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

[In the fourth circuit this rule is the same as given above, with the following paragraph added:

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.

(Promulgated April 1, 1912.)

In the seventh circuit this rule is the same as given above, with the following subdivisions added:

2. A bill of exceptions shall contain of the evidence only such a statement as is necessary for the presentation and decision of questions saved for review; and unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all the evidence shall not be allowed.

3. No document shall be copied more than once in a bill of exceptions or in a transcript of the record of the case, but instead there shall be inserted a reference to the one copy set out. A motion for a new trial, and orders and entries relating thereto, shall not be set out in the transcript unless required by written præcipe, of which a copy shall also be set out.

4. The cost of unnecessary matter in the bill of exceptions or transcript or in the printed record shall not be recovered of the appellee or defendant in error; and in its discretion the court will, in case of dispute, appoint a referee to determine and report what was unnecessary therein, and will tax the cost of the reference as shall seem just.]

### 11.

#### ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done,\* counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

[\*In the fourth circuit the words, "rule is not complied with" are here used instead of the words, "is not done."]

### 12.

#### OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation, found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

### 13.

#### SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages

for delay, and costs and interest on the appeal; but, in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court,\* the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

[In the fourth circuit, section 1 of rule 13 is the same as given above, and section 2, as promulgated April 1, 1912, reads as follows:

2. On all appeals under section 129 of the Judicial Code, the appellant shall at the time of the allowance of said appeal, if required by the judge of the court below, file with the clerk of such court a bond to the opposite party in such sum as such judge shall direct, for all costs and damages, or simply for all costs, as the said judge shall determine, if he shall fail to sustain his appeal.

\*In the eighth circuit this rule is the same as given above, except that as promulgated March 30, 1911, instead of the words, "granting or continuing an injunction in a circuit or district court," the following words are used: "of a district court, or a judge thereof, granting, continuing, refusing, dissolving or refusing to dissolve an injunction or appointing a receiver," and the following reference is added at the end of section 2: ("The Judicial Code," section 128, act of March 3, 1911.)]

#### 14.

#### WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

First circuit.—1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping,

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transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations, must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the Supreme Court.

The testimony in such record shall embrace the *viva voce* proof in the district court, if the same, or the substance thereof, has been reduced to writing with the approval of its judge. The reasonable cost of so reducing the same to writing may be taxed as a part of the cost of the record, except so far as allowed as costs in the district court.

[As amended October Term 1893, February 23, 1894.]

7. Further proof in instance causes in admiralty shall include only that which could not with diligence have been had at the trial below, or which was there rejected, or was omitted through misapprehension, provided the evidence be accompanied with a certificate of counsel showing reasonable excuse for the misapprehension. Except by order of the court first obtained, merely cumulative proofs shall not be so taken; but for this purpose the evidence of witnesses who had different duties, interests, or opportunities of observation, will not ordinarily be held cumulative in cases of collision or other maritime tort.

8. Such further proof may be taken after the appeal is allowed, in the manner provided by law for depositions *de bene esse*, or by an examiner appointed by any circuit or district judge, or selected by the parties, or upon interrogatories and commissions as provided in rule 44 of the circuit courts of this circuit, *mutatis mutandis*. It must be taken and filed forthwith after it is obtainable, but it cannot, except by order of the court, be taken or filed within thirty days before any session at which the cause may be heard as provided in paragraph 2 of rule 17, nor thereafterwards until the cause has been postponed to the next term or session.

9. Objections to further proof shall be filed with the magistrate and returned with the evidence. Within seven days after the evidence is taken, the party so objecting may file in print a motion to suppress the same, with a copy of the objections and a brief. The other party may within seven days thereafter file in print a counter-statement and brief. The objections and counter-statement, so far as they contain matters of fact *dehors* the record, shall be verified by affidavit. The court will consider the objections in advance of the trial, or in connection therewith, as it may in each case determine, and without oral argument, and will order suppressed evidence not rightfully taken. The party taking the evidence so suppressed shall pay the costs arising therefrom, including the printing thereof.

10. Nothing herein shall exclude applications for leave to take further proof, or objections thereto, in advance of the taking thereof, or objections touching the formalities of taking it; but the latter must be brought to the attention of the court forthwith after the evidence is filed.

[Added by amendment October Term, 1893, February 23, 1894.]

**Second, sixth, and seventh circuits—1.** The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court, upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the Supreme Court.

**Fourth circuit—1.** The clerk of the court to which any writ of error may be directed shall (except as otherwise provided by rule 23) make return of the same, by certifying under his hand and the seal of said court, in accordance with the act of Congress of February 13, 1911 (36 Stat. at Large, 901), and transmitting to the clerk of this court one of the printed transcripts of the record provided for by said act. In all cases of appeal and also in all cases of petition for revision in bankruptcy said clerk shall likewise certify, seal and transmit a copy of the printed transcript of the record to the clerk of this court.

2. In every printed transcript of the record the order of the parts thereof shall substantially follow the order in which the same were filed, entered or made, and shall contain a copy of such opinion or opinions of the trial judge as may have been filed. It shall be suitably indexed, and where any deposition or report of evidence requires more than one printed page the name of the deponent or witness shall be printed at the top of

each page. And the foregoing shall, so far as may be applicable, apply to the printed addenda to records hereinafter provided for.

3. Except in cases where counsel shall agree by written and signed stipulation,—which shall be a part of the record,—as to what portions of the record and proofs of the case in the court below, shall be printed in the transcript of the record for use in this court, the trial judge shall have the power, upon application after reasonable notice to the opposing party or his counsel, to determine what shall be included in such transcript, and his determination shall be signed by him, and made part of the record; he shall include in such signed paper, such portions of the record and of proofs as he may deem material for the proper disposition of the questions to be decided by this court, as also such parts as are specially required by these rules. But if any party desires printed any document or part of the record or proofs directed by the trial judge to be omitted, such party may print the same under separate cover and cause it to be certified and transmitted to this court as an addendum to the record. Such printing and certification shall be primarily at the cost of the party who requires it. The cover sheet of such addendum shall contain the title of the cause and shall plainly show that it is an addendum to the transcript and shall show at whose instance it was printed.

4. Whenever it shall be necessary or proper, in the opinion of this court or of the court below, that original papers of any kind should be inspected here, this court or the court below may make such rule or order for the safe-keeping, transporting and return of such original papers as to it may seem proper.

5. All appeals, writs of error, and citations must be made returnable not exceeding forty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The transcript of the record in cases of admiralty and maritime jurisdiction shall include the matters which, by admiralty rule 52 of the Supreme Court, are required to be included therein.

7. No transcript of the record and proofs shall (unless it be specifically otherwise ordered by the trial judge) contain a copy of the petition for writ of error or petition for appeal, the order granting writ of error or appeal, the writ of error, the appeal bond, the citation, the return of service or waiver of service of citation. In lieu thereof the originals of said documents shall be certified to this court within forty days of the date of the citation (to be returned to the court below with the mandate of this court), and in said transcript there shall be inserted a memorandum stating the date of the petition for writ of error or for appeal, the date of the order granting writ of error or allowing appeal, the date of the writ of error and date when copy thereof or copy of order allowing appeal is lodged in the office of the clerk of the court below for adverse parties, the date, penalty, the names of the obligors, the condition (whether for payment of costs and damages or for costs alone) of the appeal bond, the date

of the citation, and the date of the service thereof or of the waiver of service thereof.

No general replication in equity shall be copied into the transcript of the record, but in lieu thereof there shall be inserted a memorandum showing the date of filing of such replication and by whom filed. When a case has by writ of error or appeal been brought to this court the second time there shall only be copied in the record the proceedings subsequent to the former writ of error or appeal. It shall be the duty of the trial judge in determining what shall constitute said transcript of the record, to direct the omission of all matter which in his judgment is unnecessary to the presentation of the issues to be passed upon by this court and especially to prevent unnecessary duplications in such transcript. And the clerk below shall not certify any transcript of the record and proofs unless it contains either the stipulation of counsel or the determination of the trial judge mentioned in section 3 of this rule.

8. Whenever the printed transcript of the record or any addendum thereto as certified by the clerk of the court below shall contain any corrections or insertions, it shall be the duty of the party filing the printed transcript of addendum in this court to correct all the copies of the same so as to correspond with the certified transcript or addendum.

(Promulgated April 1, 1912.)

[In the third circuit this rule is the same as in the second circuit as above given except that after the word "directed" in the first section, is added the words "upon being paid or tendered his fees therefor."

In the fifth circuit, sections 1, 2, 3, and 4 of rule 14 are the same as in the second circuit. Section 5 was amended January 12, 1905 so as to read as follows:

5. All appeals, writs of error, and citations must be made returnable and the transcript filed in the clerk's office at New Orleans not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

Provided, however, that appeals taken from interlocutory decrees under the seventh section of the act entitled "An Act to Establish Circuit Courts of Appeals and Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891, and amendments thereto, shall be made returnable not exceeding ten days from the day of taking the same.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the Supreme Court.

In the seventh circuit this rule is the same as in the second, as above given, with an addition to the first subdivision thereof as follows:

The clerk may require of the appellant or plaintiff in error a written praecipe stating in detail what the transcript shall contain, and, when a praecipe is filed, shall insert a copy thereof in the transcript.

And with an addition to the 5th subdivision as follows:

If a party be nonresident, the citation and any other writ or notice necessary in the prosecution of the appeal or writ of error may be served upon such party's counsel or attorney of record, who for such purpose may not be discharged unless another resident be designated of record in the case, upon whom service may be made.

In the eighth circuit it is the same as in the second as given above, except that the words "and in cases at law a complete copy of the charge

of the court to the jury" were added to section two thereof by amendment February 10, 1896, and section 3 of this rule, as promulgated March 30, 1911, reads, as follows:

3. No case will be heard until twenty-five copies of the printed transcript of the record, containing in themselves, and not by reference, all the papers, exhibits, depositions, sketches, drawings, photographs, maps, blue prints and other proceedings, which are necessary to the hearing in this court, printed title pages in the form prescribed in section five of rule 26, chronological printed indexes of each and every item of their contents specifying the pages where evidence, testimony and exhibits including those in the body of any pleading, order or bill of exceptions may be found and briefly naming or describing each exhibit in addition to its number together with a statement of the numbers, names and dates of issue of any patents, shall have been filed in this court. And the words "sixty days" are substituted in section five thereof in the place of the words "thirty days," and in the ninth circuit the rule is the same, except that section two thereof reads as follows:

"2. In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record the original writ of error and citation, or citation issued in the cause, and a certificate under seal stating the cost of the record and by whom paid."

And section five was amended October 20, 1899, so as to read as follows:

5. All appeals, writs of error, and citations must be made returnable at San Francisco, California, not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.]

## 15.

### TRANSLATIONS.

Whenever any record\* transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding, in a foreign language, and the record\* does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record\* shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court,\* in order that a translation may be there supplied and inserted in the record.

[In the fourth circuit this rule, as promulgated April 1, 1912, reads as follows:

Whenever any transcript of the record transmitted to this court shall contain any documents, papers, testimony or proceedings in a foreign language, and the transcript does not also contain a translation of the said documents, papers, testimony or proceedings made under the authority of the lower court, or admitted to be correct, the transcript of the record may be returned by this court to the lower court in order that a translation may there be supplied, printed and certified to this court.

\*In the eighth circuit this rule is the same as given above, except that, as promulgated March 30, 1911, the word "transcript" is used instead of "record," and the following words are inserted before the last clause, beginning "in order:" "and if the record is to be printed in the court below, it shall be reported to that court by its clerk."]

## 16.

## DOCKETING CASES.

**First, second, third, seventh, eighth, and ninth circuits—1.** It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

**Fourth circuit—1.** Except as otherwise provided by rule 23, it shall be the duty of the appellant, plaintiff in error, or petitioner for revision in bankruptcy to cause to be printed and suitably indexed the transcript of the record (as well as any addendum to the record required by such party) and to deliver the same to the clerk or deputy clerk of the court below for certification, sealing and transmission to this court within forty days from the date of the citation or the filing of the petition for revision; and also on or before the expiration of the said forty days to file with the clerk of this court at least twenty-four printed copies of the said transcript and addendum above mentioned, if any. He shall also at the same time furnish to the adverse party at least three copies of the printed transcript of the record, including any addendum thereto printed at his instance. It shall also be the duty of appellant, plaintiff in error or petitioner for revision to docket the cause in this court on or before the return day, whether in term time or vacation. In case any appellee or defendant in error shall have required an addendum to the transcript of record, it shall be the duty of such party to file in the office of the clerk of this court, on or before the said return day, at least twenty-four printed copies of such addendum as well as one additional copy thereof, which shall have been duly certified by the clerk of the court below; and such party shall

at the same time furnish to the adverse party at least three copies of said printed addendum.

The time within which any of the acts in this section above mentioned are required to be done may for good cause shown be enlarged by the justice or judge who signed the citation or any judge of this court, provided the order of enlargement be made prior to the expiration of such time; such order to be filed with the clerk of this court.

2. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the transcript of the record after the same shall have been docketed and dismissed under this rule unless by order of the court.

3. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

4. Upon the filing of the transcript of the record in any case brought up by writ of error or appeal, the appearance of counsel for the party docketing the cause shall be entered by the clerk of this court as of course.

5. Defendants in error, or appellees, are required, at the time of entering their appearance by attorney, to make a deposit of \$20.00, for account of costs to be incurred by them in this court. In case of affirmance, or dismissal, when all costs shall have been paid by the plaintiff in error or appellant, the said deposit will be returned. This is applicable to all cases except when the United States is defendant in error or appellee.

(Promulgated April 1, 1912.)

[In the fifth circuit this rule is the same as that above given, except that by amendment June 20, 1895, the words "the justice or judge who signed the citation," following the words, "but, for good cause shown" and preceding the words "any judge of this court," were stricken out; and an additional section to said rule was adopted April 23, 1895, as follows:

"4. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf."

And in the sixth circuit the rule is the same as that above given, except that it was amended July 6, 1897, by inserting at the end of the first sentence of the first section thereof, and as a part thereof, the following: "And at the time of filing the record, the plaintiff in error or appellant shall deposit with the clerk the sum of thirty dollars as security for costs except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed in *forma pauperis*."

In the eighth circuit the following note is appended to the rule as promulgated March 30, 1911:

"Note.—A deposit of thirty-five dollars to secure clerk's costs is required before the record in a cause is filed and docketed."]

## 17.

## DOCKET AND CALENDARS.

**First circuit**—1. The clerk shall enter and number on the docket all cases consecutively, in their proper chronological order.

2. He shall print at least twenty days before the first Tuesday of October and of January and the second Tuesday of April, a calendar of all the pending cases, arranged by districts in the following order: Maine, New Hampshire, Rhode Island, Massachusetts.

## DOCKET.

**Second, third, fifth, sixth, and eighth circuits**—The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term;\* and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

On March 12, 1900, the following additional rule was adopted by the third circuit: In making up the docket for argument for the term cases continued at former terms and all remanents shall be placed at the head of the argument list in the order, with respect to each other, in which they stood on the docket at the last preceding term.

The following order was made December 7, 1892.

It is ordered that hereafter there shall be but a single court docket, and no "special docket," and cases shall be placed thereon as follows: I. Those cases on the trial or hearing of which both of the circuit judges shall be competent to sit. II. Those cases on the trial or hearing of which the circuit judge oldest in commission shall be competent to sit. III. Those cases on the trial or hearing of which the circuit judge youngest in commission, but not the other circuit judge, shall be competent to sit. Under and with respect to each of these three general divisions, there shall be placed first in order upon the docket those cases in which the district judge assigned for the term shall be competent to sit, and immediately thereafter the cases in which he shall not be competent to sit. Subject to the foregoing, cases shall be arranged in proper chronological order as heretofore.

[An additional rule was adopted in the third circuit March 12, 1900, as follows:

In making up the docket for argument for the term, cases continued at former terms and all remanents shall be placed at the head of the argument list, in the order, with respect to each other, in which they stood on the docket at the last preceding term.]

**Fourth circuit**—1. The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order.

2. All cases in which copies of the printed record are delivered to the

adverse party or his counsel at least twenty days before any regular term or adjourned term shall stand for argument at the term holden next after the docketing of the case.

3. The clerk before each regular term shall print a docket containing all pending cases and such docket shall be called at every term or adjourned term. If a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error, appellant or petitioner for revision, unless sufficient cause is shown for further postponement.

4. By consent of counsel in writing filed with the clerk of this court, any cases not included in section 2 of this rule may be by the clerk placed at the foot of the argument docket and may be argued at any term or adjourned term, provided the briefs on both sides are filed before the case is called.

(Promulgated April 1, 1912.)

Sixth circuit—The words, “term or adjourned term,” as given above, read, “calendar session,” as provided in rules 3 and 37, and the word “terms,” in next line, reads “calendar sessions.”

Seventh circuit—The clerk shall prepare calendars of causes for the regular terms of this court, to be held on the first Monday of October in each year, and calendars for each adjourned term of the court placing thereon in proper chronological order only causes in which the record shall have been printed fully thirty days before such term or such adjourned term, and those causes in which the record having been printed, briefs upon both sides have been filed seven days before the beginning of such term or adjourned term.

\*Eighth circuit—This rule is the same as given above, except that, as promulgated March 30, 1911, the following words are inserted after the words “or adjourned term:” “except cases from the districts of Colorado, Utah, Wyoming and New Mexico which cases shall only be called at the September term unless counsel otherwise stipulate as provided in rule 3.”

Ninth circuit—The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit of twenty-five dollars in each case, file the record and enter upon a docket all cases brought to and pending in the court, in their proper chronological order.

## 18.

### CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the same will not be

granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

[The only way in which this rule differs in the different circuits is that in the eighth the word "hereafter," following the words "will be," and preceding the word "awarded," is omitted.]

## 19.

### DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personality or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error\* shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error,\* he shall be entitled to open the record and, on hearing, have the judgment or decree reversed, if it be erroneous: Provided however, That a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days, after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit or \*district court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the circuit or\* district court, and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some state or territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, or in the District of Columbia, and stat-

ing therein the name and character of such representative, and the State or territory or district in which such representative resides; and upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous; Provided, however, That a proper citation, reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: Provided, also, That in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may, at any time before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

[In the fourth circuit this rule is the same as given above, except that (as promulgated April 1, 1912), in the first section the words "or appellee" are added after the words "defendant in error," and the words "or appellant" after the words "plaintiff in error," and in the third section the words "circuit or" do not appear before the words "district court."]

## 20.

### DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk\* to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

[In the fourth circuit this rule is the same, except that, as promulgated April 1, 1912, the following sentence is added at the end: "No attorney's docket fee shall be taxed in a case dismissed under this rule."

\*In the eighth circuit the rule is the same down to and including the words "duty of the clerk," and the remaining part of the rule, as promulgated March 30, 1911, is as follows: "seasonably to present such agreement to the court for its consideration and determination."

In the ninth circuit this rule is entitled "Dismissing cases by agreement," but the rule itself is the same as that in the other circuits.]

## 21.

### MOTIONS.

First circuit—1. The motion day shall be the first Tuesday of every

stated session of the court, and any other Tuesday while the court shall remain in session.

2. All motions to the court shall be reduced to writing and shall contain a brief statement of the facts and objects of the motion.

3. All motions to dismiss writs of error or appeals (except motions to docket and dismiss under rule 16) or to advance cases, or for a writ of certiorari, and other special motions, shall be printed, and be accompanied by printed briefs.

4. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party or his counsel.

5. Any motion, of which counsel shall have given notice to the clerk in advance shall be entered on the clerk's list in the order in which he receives notice thereof, and shall have priority in that order before other motions, unless otherwise specially ordered by the court.

6. Half an hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court granted before the argument begins.

[As amended October term, 1891, September 15, 1892.]

Second, third, fourth, fifth, sixth, seventh, and eighth circuits—1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

[In the ninth circuit this rule is the same as the above except that the words "and shall be served upon opposing counsel at least five days before the day noticed for the hearing" are added at the end of the first section thereof.]

## 22.

### CALL AND ORDER OF THE CALENDAR. PARTIES NOT READY.

First circuit—1. On the first Tuesdays of October, January, and April, the court will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the session in the same order, except as hereinafter provided.

2. Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

3. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

4. When a case is reached in the regular call of the calendar, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

5. If the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready, the case may be dismissed, or be postponed to the next session for the same district, as the court may order.

6. If a case is called for hearing at two stated sessions successively, and upon the call at the second session neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

7. The court may, by order entered on the first day of any stated session, make special assignments for the purpose of grouping cases in which the same judges are to sit.

8. No case coming from the district of Massachusetts shall be called before the second Tuesday of the session.

9. The court will not hear arguments on Mondays or Saturdays, unless for special cause it shall so order.

10. Five cases shall be considered as liable to be called on each day during a stated session; but on the coming in of the court on each day the entire number of five cases will be called, with a view to the disposition of such of them as are not to be argued.

11. Revenue and other cases in which the United States are concerned, and which also involve or affect some matter of general public interest, and criminal cases, and cases once adjudicated by this court on their merits and again brought up by writ of error or appeal, may be advanced by leave or order of the court.

12. Two or more cases involving the same question may, by leave of the court, be heard together, to be argued as one case or more, as the court may order.

13. No stipulation or agreement of counsel to pass or postpone a case, or to substitute one case for another, shall be recognized as binding. A case can only be so passed, postponed, or submitted, upon application made and leave granted in open court.

[As amended October Term, 1891, September 15, 1892.]

Second, third, fifth, seventh, and eighth circuits—1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff,\* called and the writ of error or appeal dismissed.

2. Where the defendant\* fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff\* and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.\*

Fourth circuit—1. When a case is called for hearing, and no counsel appears and no brief has been filed for the plaintiff in error or appellant, the defendant in error or appellee may have the adverse party called and the writ of error or appeal dismissed.

2. Where the defendant in error or appellee fails to appear when the

case is called for hearing, the court may proceed to hear argument on the part of the plaintiff in error or appellant, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket and no counsel appears for either party and no submission of the case is asked, the case may be dismissed at the cost of the plaintiff in error or appellant.  
(Promulgated April 1, 1912.)

[In the sixth circuit this rule is the same as given above except that it was amended June 23, 1893, by adding a new section as follows:

"4. All causes shall stand for hearing when the time allowed for printing the records and the briefs of both parties shall have expired; Provided, however, That causes may be heard when the records and briefs therein are printed, though the time allowed for printing records and briefs may not have expired."

\*In the eighth circuit the rule is the same as given above, except that, as promulgated March 30, 1911, the words "in error or appellant" occur after the word "plaintiff," and the words "in error or appellee" occur after the word "defendant."

In the ninth circuit it is the same as given above except that the words "in error or appellant" are added at the end of third section thereof.]

## 23.

### PRINTING RECORDS.

**First circuit—1.** In all cases, the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when the case is reached at the regular call of the docket, the case may be dismissed.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed under the clerk's supervision, for the use of the court and of counsel.

4. The clerk shall take to the printer the original transcript on file; but shall cause copies to be made for the printer of such original papers sent up under rule 14, or other original papers, as are necessary to be printed.

5. The clerk shall supervise the printing, and see that the printed copies are properly indexed; and he shall distribute printed copies to the judges, and the reporter, from time to time, as required, and three copies to the counsel for each party. An additional number of copies may be printed at the request of either party for his own use and at his own expense, or by order of the court.

6. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

7. The clerk may receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

8. The clerk shall receive from the party at whose expense the record is printed, in addition to the cost of printing, fifteen cents for each printed page of the record and index, in full, for preparing the record for the printer, indexing the same, supervising the printing, distributing the copies and for all other incidental services relating to the subject-matter of this rule, to be accounted for with his emoluments.

Paragraph 8 was repealed by the amendment of October 4, 1898.

9. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

10. In case of reversal, affirmance, or dismissal, with costs, the cost of printing the record and the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

[As amended October Term, 1891, September 15, 1892.]

Second circuit—On the filing of the transcript in every case, the clerk shall forthwith cause fifteen copies of the same to be printed, and shall furnish three copies thereof to each party, at least thirty days before the argument, and shall file nine copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

[As amended October 19, 1891.]

Third circuit—On the filing of the transcript, the clerk shall forthwith cause twenty copies of the record to be printed, and shall furnish three copies thereof to each party at least six days before the case is called for argument, and shall file fourteen copies thereof in his office. The parties may stipulate, in writing, that parts only of the record shall be printed, "or that any number not less than ten printed copies of patents and other

exhibits may be furnished," and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk may demand of the plaintiff in error, or appellant, the cost of printing the record before ordering the same to be done. If the record shall not have been printed when the case is reached in the regular call of the docket, because of the failure of a party to advance the cost of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

2. The clerk shall receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which may have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

[As amended January 18, 1908.]

March 18, 1895. Ordered that, except upon special allowance by the court or a judge, no cause shall be placed on the docket for argument unless the transcript shall have been filed with the clerk, under rule 23, at least fifteen days before the first day of the term.

[As amended January 18, 1908.]

Fourth circuit—This rule shall apply only to cases in which counsel for all parties to any cause pending in this court, or about to be brought into this court, shall by stipulation, in writing, filed with the clerk of the court below, agree to be governed by the terms thereof.

1. The transcript may be made and the record printed as has been heretofore the practice of this court, and the same shall, subject to the provisions of sections 3, 6 and 7 of rule 14, be made up by the clerk of the court below and transmitted to this court under his hand and seal as heretofore.

2. All records in such cases shall be printed under the supervision of the clerk of this court by such printer and at such rate as this court may designate. In such cases, upon the payment of the estimated cost of printing, together with the supervising and other fees established by law (which amount shall be deposited with the clerk within ten days after notice thereof), the clerk shall cause to be printed thirty-five copies of the record, twenty-five copies of which shall be filed for the use of the court, three copies furnished to the adverse party, and the remaining copies to be delivered to the appellant, plaintiff in error or petitioner.

3. The parties may stipulate in writing that parts only of the transcript of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record.

4. If the record shall not have been printed when the case is reached on the regular call of the docket, the case may be dismissed.

5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for the printing of the record and the clerk's fees for supervising the same shall be taxed against the party against whom costs are given.

S. S. at L.—19.

6. In cases brought here under this rule it shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

7. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

8. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered as of course.

(Promulgated April 1, 1912.)

Fifth circuit—1. The clerk shall, upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached for hearing on the regular call of the docket, the case shall be dismissed.

This rule was amended January 12, 1905, by striking out the words "if he shall not pay it within a reasonable time," and inserting in their place the words, "if he shall not pay it within fifteen days in ordinary cases, and within three days in preference cases, after the date of such notice."

2. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to the counsel of each party whose appearance shall have been entered, three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed prior to the printing of the record, agree that only parts of the record shall be printed, and the same may be heard only on the parts so printed, but the court may direct the printing of other parts of the record.

3. The clerk shall take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under rule 14, or other original papers, as are necessary to be printed.

4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

5. The clerk shall supervise the printing, and see that the printed record is properly indexed. There shall be omitted from the printed transcripts the following:

(1) Commissions to take testimony, and the formal captions to all depositions, and the certificates of commissioners as to the taking of the depositions, except in cases where objections have been made to the depositions on account of defects in caption or certificate.

(2) All process in the nature of subpoenas, citations, summons and subpoenas in chancery, unless from the assignment of errors it appears that some issue is raised which makes it necessary for the court to inspect such writs, and then only such as are involved.

In every transcript wherein any pleading, exhibit, or other paper appears at more than one place, such pleading, exhibit, or other paper shall be printed at the place it first appears in said transcript, and not thereafter; but the omission shall be indicated by apt notations and references to the pages of the printed record where it appears.

The clerk shall distribute the printed copies to the judges of the court and to the reporter from time to time as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof.

(Promulgated December 8, 1905.)

6. In case of reversal, affirmance, or dismissal, with costs, the amount of the costs of the printing of the record and of the clerk's fee for supervising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

7. The clerk shall receive from either party, and use as parts of the printed record so far as the same may be of proper size and type, any portions which may have been printed in any other court, and also printed copies of patents and exhibits, allowing the party furnishing the same such sums therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

[As amended May 11, 1897.]

Sixth circuit—1. The clerk shall supervise the printing of all records, and upon the docketing of a case shall forthwith cause an estimate to be made of the cost of printing the record and his fee for preparing it for the printer and for supervising the printing thereof, and shall at once notify

the attorney for the plaintiff in error or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid the writ of error, or appeal, may be dismissed upon the motion of the opposite party or by the court of its own motion.

2. After the payment to him of such estimate the clerk shall cause at least twenty-five (25) copies of the record to be printed forthwith, shall file the same and shall furnish to each of the respective parties three (3) copies thereof, and take a receipt therefor.

3. Parties may agree by written stipulation filed with or prior to the filing of the record that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

The plaintiff in error or appellant may, within ten days after the case shall be docketed in this court, file with the clerk a statement of the parts of the record which he thinks necessary for the consideration thereof and forthwith serve on the adverse party a copy of such statement. The adverse party, within fifteen days after service of such statement, may designate in writing, filed with the clerk, additional parts of the record which he thinks material, and if he shall not do so he shall be held to have consented to the hearing of the parts designated by the plaintiff in error or appellant.

If parts of the record shall be so designated by one or both parties, the clerk shall print those parts only, and the court will consider nothing but those parts of the record.

If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the court to require.

If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made which the court shall think proper.

If good cause be shown the time within which the statement of the parts of the record is to be filed with the clerk by either party, as above limited, may be enlarged by the court in session or by either circuit judge if eligible to sit in the cause.

4. If the cost of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same. If the cost is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver any copies thereof.

5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing and supervision shall be taxed against the party against whom the costs are given, and shall be inserted in the mandate or other proper process.

6. In any case where the record shall have been printed in the court below, either circuit judge may, on the written application of the plaintiff in error or appellant, order that such printed record be used in this court. In such case the judge shall require as a condition of making the order,

a certificate of the clerk of this court that the record is in accordance with the printing rules and is properly indexed, in which case the supervision fee, provided in paragraph 7 of rule 31 shall be charged and collected by the clerk.

7. The clerk of this court shall receive proposals for printing, which shall be submitted to the senior circuit judge, who may in his discretion award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded. And when a case shall be heard upon a record printed in the court below, the cost for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree.

[As amended October 8, 1894, December 13, 1895, and July 6, 1897.]

**Seventh circuit—1.** In all cases the plaintiff in error or appellant on docketing a case and filing the record shall enter into an undertaking to the clerk with surety to be approved by the clerk for the payment of all costs which shall be incurred in the cause, and shall deposit with the clerk \$25 to be applied to the payment of costs and fees, and from time to time when necessary shall, on the demand of the clerk, make further deposits for that use.

2. The clerk, upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

3. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to each of the respective parties at least three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed with or prior to the filing of the record, agree that only parts of the record shall be printed, and the case may be heard only on the parts so printed, but the court may direct the printing of other parts of the record.

4. The clerk shall cause at least twenty-five copies of the record to be printed and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

5. The clerk shall supervise the printing and see that the printed record is properly indexed. He shall distribute the printed copies to the justices of the court from time to time, as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof.

6. In case of reversal, affirmance, or dismissal with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same, shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other process.

7. Upon the clerk's producing satisfactory evidence by affidavit or the acknowledgment of the parties or their sureties, or attorneys, of having served a copy of the bill of fees, due from them respectively in this court on such parties, their sureties or attorneys, an attachment shall issue against such parties or their sureties respectively, to compel the payment of said fees.

8. The clerk shall adopt a uniform size for the printing of all records, and the same shall be printed in small pica type, on clear white paper, with a margin of not less than an inch and a half, and show by a note or memorandum the time when each pleading or document was filed, and the printed record shall also contain running titles of its contents.

9. The briefs of attorneys shall also be printed and conform as nearly as practicable to the size of the printed record.

10. The clerk shall, on or before the conclusion of each case, collect and file, or otherwise preserve together one copy of the printed record and of each brief, printed motion and argument submitted in each case.

11. In any case where the record shall have been printed in the court below, the presiding judge may on the application of the plaintiff in error or appellant order that such printed record may be used in place of the printing hereinbefore provided for. But the clerk shall prepare and cause to be printed and attached to the printed record an index thereof, and shall be paid the same fees for the indexing and supervising of such printed record as if printed under his personal supervision.

12. The clerk of this court shall advertise for proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who shall award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded. And when a case shall be heard upon the record printed in the court below, the costs for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree.

13. The fees of the clerk of this court, as prescribed by order of the Supreme Court, made February 28, 1898, are as follows:

Docketing a case and filing the record .....	\$ 5 00
Entering an appearance .....	25
Transferring a case to the printed calendar .....	1 00
Entering a continuance .....	25
Filing a motion, order, or other paper .....	25
Entering any rule, or making or copying any record or other paper, for each 100 words .....	20
Entering a judgment or decree .....	1 00
Every search of the records of the court and certifying the same .....	1 00
Affixing a certificate and a seal to any paper .....	1 00
Receiving, keeping and paying money in pursuance of any statute or order of court, 1 per cent on the amount so received, kept, and paid .....	

Preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, for each printed page of the record and index .....	25
Making a manuscript copy of the record, when required by the rules, for each 100 words (but nothing in addition for supervising the printing) .....	20
Issuing a writ of error and accompanying papers, or a mandate or other process .....	5 00
Filing briefs, for each party appearing .....	5 00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed \$5 in the whole for any copy) .....	1 00
Attorney's docket fee .....	20 00

Eighth circuit—1. In cases brought to this court in which the plaintiff in error or appellant elects to waive the printing of the record under the provisions of the act of Congress, entitled "An act to diminish the expense of proceedings on appeal and writ of error or of certiorari," approved February 13, 1911, and file a typewritten or manuscript transcript of the record in this court, such plaintiff in error or appellant may within twenty days from and after the date of the filing and docketing of the record in this court, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within twenty days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

2. On the filing of the transcript in every such case the clerk shall cause thirty copies of the same, or the parts thereof designated under this rule, to be printed, and such additional number of copies as counsel for either of the parties may direct, and shall furnish three copies of the record so printed to each party at least sixty days before the argument.

3. In cases brought to this court in which the record has been printed and used upon the hearing in the court below, and which substantially conform to the printed records in this court, the plaintiff in error or appellant upon application to and by leave of this court, may furnish to the clerk twenty-five copies of such record, used on the hearing in the court below, to be used in the preparation of the printed record in this court; and the clerk's fee for preparing the record for the printer, indexing same, supervising the printing and distributing the copies, shall be

computed as if said record so furnished had been printed under his supervision.

4. The clerk shall be entitled to demand of the plaintiff in error or appellant the cost of printing the record before ordering the same to be done.

5. If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the costs of printing, the case may be dismissed.

6. In case of reversal, affirmance or dismissal with costs the amount paid for printing the record shall be taxes against the party against whom costs are given.

7. In any case brought to this court, in which the record has been printed, in which a writ of certiorari shall be granted under the provision of rule 18 of this court the return to such writ of certiorari shall be printed in the same manner as the record was.

8. If in any cause in which the record or a portion thereof has been printed it shall be made to appear to this court that the printed transcript does not substantially conform to the requirements of the rules of this court, it may be rejected and stricken from the files and such order relative thereto may be entered as the court shall deem proper.

(Promulgated March 30, 1911.)

Ninth circuit—1. Hereafter all records shall be printed under the supervision of the clerk, and upon the docketing of a cause he shall cause an estimate to be made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk, and for want of such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed.

2. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed under his supervision for the use of the court and of counsel.

3. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers sent up under rule 14, section 4, as are necessary to be printed; and the whole of the record in cases of original jurisdiction.

4. The clerk shall supervise the printing and see that the printed copy is properly indexed. He shall distribute the printed copies to the judges and the reporter, and one or more printed copies to the counsel for the respective parties.

5. If the expense of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying same. If the expense is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver copies to the parties or their counsel.

6. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record and of the clerk's fee shall be taxed against the party against whom costs are given.

7. The plaintiff in error or appellant may, upon filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party within ten days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record, as well as the documents to be printed or omitted.

8. At the time of filing the record and docketing the cause, counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient size, shall be used in printing the record without cost to the parties.

9. The fee of the clerk for superintending the printing, indexing the record and distributing the printed copies, is hereby fixed at ten cents per printed page.

#### 24.

#### BRIEFS.

**First, third, and fifth circuit—1.** The counsel for the plaintiff in error or appellant, shall file with the clerk of this court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated,—

(1) A concise abstract, or statement of the case presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error as-

serted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

[In the second circuit this rule is the same except that on October 19, 1891, section 1 thereof was amended so as to read as follows:]

"1. The counsel for the plaintiff in error, or appellant, shall file with the clerk of this court, at least twenty days before the case is called for argument, ten copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side."

And section 3 thereof was amended so as to read as follows:

"3. The counsel for a defendant in error, or an appellee, shall file with the clerk, at least ten days before the case is called for hearing, ten copies of his printed brief, one of which shall, on application, be furnished to each of the counsel on the opposite side. His brief shall be of a like character with that required of the plaintiff in error, or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error, or appellant, is controverted."

[In the fourth circuit the rule is the same in the first section down to, and including, the words "clerk of this court," and the rest of the section reads as follows, as promulgated April 1, 1912: "fifteen days before every term or adjourned term, twenty copies of a printed brief, one of which shall forthwith be furnished by the clerk to each of the counsel of record engaged upon the opposite side."

Subdivision (2) of section 2 as given above does not appear in the promulgation of April 1, 1912; and section 3 reads as follows:

3. The counsel for defendant in error or appellee shall file with the clerk of this court, at least five days before every term or adjourned term, twenty copies of a printed brief, one of which shall forthwith be furnished by the clerk to each of the counsel of record engaged upon the opposite side. His brief shall be of a like character with that required of the plaintiff in error or appellant, except no statement of the case shall be required, unless that presented by the plaintiff in error or appellant is controverted.

Section 4 does not appear in this rule as promulgated April 1, 1912; section 5 as given above is numbered 4; section 6 as above is 5; and section 6 reads as follows:

6. Counsel for either party may file with the clerk of this court twenty printed copies of a reply brief, provided the same are filed at least three days before the case is reached in its regular order on the argument docket.

In the fifth circuit the first paragraph of this rule was amended January 12, 1905, so as to read:

1. The counsel for the plaintiff in error, appellant, or petitioner shall file with the clerk of this court, at least fifteen days in ordinary cases, and in five days in preference cases, before the case is called for argument, twenty copies of a printed brief, one to be signed in handwriting by an attorney of this court who has entered an appearance in the case. One copy of the brief shall, on application, be furnished to each of the counsel engaged upon the opposite side.

And the third paragraph was amended so as to read:

3. The counsel for defendant in error, appellee, or respondent shall file with the clerk of this court, at least five days before the case is called for argument in ordinary cases and before the case is called for argument in preference cases, twenty copies of a printed brief. His brief shall be of a like character with that required of the plaintiff in error, appellant, or petitioner, except that no specification of errors shall be required and no statement of the case, unless that presented by the plaintiff in error, appellant, or petitioner is controverted.

In the seventh circuit the rule is the same as in the first as given except that the briefs are required to be filed by the first section thereof within twenty days after the date of the delivery by the clerk of the printed record. And by section 3 thereof within twenty days after the filing of the brief of the plaintiff in error or appellant, and to that section at the end thereof is added the words: "Either party may, at or before the argument of the cause, file a supplemental brief strictly confined to matter in reply to this brief of the opposite party."

In the eighth circuit the rule is the same as that in the first as given above, except that in the first section the words "forty days" are substituted in the place of the words "six days;" at the beginning of section 2, after the words "This brief," the following passage is inserted, as promulgated March 30, 1911:

"shall be printed on unglazed paper, and it and all quotations contained

therein shall be in substantial conformity with the size and type prescribed by rule 26 for the printing of records and"

In section 3, in the first sentence, the words "at least three" do not appear, but as promulgated March 30, 1911, the following passage occurs instead:

"printed on unglazed paper and in substantial conformity with the size and type prescribed by rule 26 for the printing records, at least ten."

In the ninth circuit the rule is the same as that in the first as given above except that the first section thereof reads as follows:

"1. The counsel for the plaintiff in error or appellants shall file with the clerk of this court, twenty copies of a printed brief, and serve upon counsel for the defendant in error or the appellee one copy thereof, at least ten days before the case is called for argument."

And the third section thereof reads as follows:

"3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief and serve upon counsel for plaintiff in error or appellant one copy thereof, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted."]

Sixth circuit—1. The counsel for the plaintiff in error shall file with the clerk of this court within twenty-five days after the filing of the printed copies of the record, as required in rule 23 as amended, twenty copies of a printed brief, one of which shall on application be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated,—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, within forty days after the filing of the printed record, as required by rule 23. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no statement of the case shall be required unless that presented by the plaintiff in error or appellant, is controverted.

4. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of the adversary, and by request of the court.

5. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

[As amended October 22, 1894.]

## 25.

## ORAL ARGUMENTS.

**First, third, fourth, sixth, eighth, and ninth circuits—1.** The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: Provided always, That a fair opening of the case shall be made by the party having the opening and closing arguments.

[In the second circuit the rule is the same as that above given, except that the third section thereof was amended November 5, 1897, so as to read as follows:

"Upon writs of error, appeals in customs cases, and appeals from orders granting or refusing a preliminary injunction, one hour on each side, and in other cases two hours, will be allowed for the argument, and no more, without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: Provided, always, That a fair opening of the case shall be made by the party having the opening and closing arguments."

In the fourth circuit this rule is the same as given above, except that as promulgated April 1, 1912, the following passage is added to section 1: "Where there are cross writs of error the court may direct that they be argued together. In such event the plaintiff in the court below shall be entitled to open and conclude the argument."

In the fifth circuit the rule is the same as that of the first as given above except that the third section thereof was amended February 27, 1894, so as to read as follows:

"3. One hour will be allowed for the plaintiff in error or appellant to open and present his case, and one hour will be allowed to the defendant in error or appellee to answer; thirty minutes will then be allowed to the plaintiff in error or appellant to reply. No more time will be allowed for argument without special leave of the court."

In the seventh circuit the rule is the same as that of the first circuit as given above, except that there is added thereto a fourth section reading as follows:

"4. Reading at length from briefs or reported cases shall not be indulged."

## 26.

## FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

**First, second, third, and fifth circuits—All records, arguments, and briefs,**

printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

[The above rule was amended in the second circuit December 7, 1899, so as to read: "All arguments and briefs printed for the use of the court must be printed upon a page 11 inches long by 7 inches wide, and must have a margin of at least 2 inches in width."]

**Fourth circuit**—All records, arguments, transcripts of record, addenda thereto, arguments and briefs, printed for the use of this court, shall be in small pica type, 24 pica "ems," to a line, on unglazed paper, with an index and a suitable cover containing the title of the court, the cause, and the court from which the case is brought into this court, and the number of the case. Size of pages to be  $9\frac{1}{4} \times 6\frac{1}{4}$  inches, except that in patent cases the size of the pages shall be  $10\frac{1}{8} \times 7\frac{1}{8}$  inches; that is to say, large enough to bind in copies of patent office drawings and specifications without folding. So much of the record as was printed in the court below may be used in this court if they conform to this rule.

(Promulgated April 1, 1912.)

[The above rule in fifth circuit was amended May 29, 1900, so as to read as follows:

All arguments, briefs, motions, and petitions for rehearing, printed for the use of the court, must be printed on white book paper; size of paper page trimmed to be  $6\frac{1}{4} \times 9\frac{1}{2}$  inches; size of type page to be 4 by 7 inches exclusive of folio; margin to be properly arranged with a view to rebinding; type must not be smaller than primer.]

**Sixth circuit**—1. All records shall be of a uniform size, printed in small pica type, 24 pica "ems" to a line, 48 lines to a page, solid, with an index, and a suitable cover containing the title of the court and cause, the court from which the case is brought to this court, and the number of the case; size of pages to be  $9\frac{1}{4} \times 6\frac{1}{4}$  inches, except that in patent cases the size of the pages shall be  $10\frac{1}{8} \times 7\frac{1}{8}$  inches; that is to say, large enough to bind in copies of patent office drawings and specifications without folding.

2. All arguments and briefs of attorneys shall be printed and conform as near as practicable to the size of the printed record.

[As amended January 2, 1894.]

**Eighth circuit**—1. All transcripts of record, arguments and briefs for the use of this court, except in patent causes as hereinafter provided, shall be printed on unglazed paper not less than  $6\frac{1}{4}$  inches in width by  $9\frac{1}{2}$  inches in length, including a sufficient margin so that they can be conveniently trimmed and bound in volumes. The paper should equal a weight of 80 pounds per ream on basis of size of sheet 25 by 38 inches.

2. All records and briefs in patent causes may be printed on unglazed paper, of the weight as provided in section one of this rule, of such size, that copies of letters patent may be inserted therein without folding, but the size of such records and briefs in patent causes shall not be less than  $7\frac{1}{2}$  inches wide and  $9\frac{1}{2}$  inches long so that the records and briefs can be conveniently trimmed and bound in volumes.

3. All records, briefs, supplemental transcripts and returns to writs of certiorari shall be printed in clear eleven point or small pica type (never smaller than ten point), of 26 pica or 28 small pica ems to a line and 52 lines, including running head, solid, per printed page, containing substantially 1400 small pica ems. Where testimony or depositions by question and answer are printed the answer shall follow on same line as the question whenever the same can be done.

4. All indexes to records and tabular exhibits, which from their nature require smaller type, may be printed in eight point or brevier type.

5. All covers for records shall be printed in a neat and workmanlike manner on substantial paper equal to a weight of 96 pounds per ream on the basis of a sheet 25 by 40 inches, and shall contain in conspicuous type the following matter, viz.:

**Transcript of Record.**

First.

Second.

United States Circuit Court of Appeals Eighth Circuit.

Third. The abbreviation for number "No." followed by a blank line  $\frac{3}{4}$  of an inch in length.

Fourth. The title of the cause as it will be docketed in this court, viz.: ..... , Appellant (or Plaintiff in Error) as the case may be, vs. ..... , Appellee (or Defendant in Error).

Fifth. The words "In Error to" (or "Appeal from") as the nature of the case may require, followed by the correct title of the trial court.

6. Unless otherwise expressly directed by counsel, the full titles of the court and cause once correctly shown in the printed transcript shall not be repeated when unchanged. There shall be placed at the head of each subsequent pleading, etc., a brief designation of its character.

Unless otherwise expressly directed by counsel, the indorsements on pleadings, etc., shall not be printed in full; it shall be sufficient to print: "Filed in the ..... Court on .....," giving the correct date and name of the court.

The date of all orders and decrees and the name of the judge or judges making them shall always appear.

In printed transcripts the pleadings, orders, testimony of witnesses, etc., shall be separated by a face rule three inches long. The clerk shall indicate to the printer the appropriate places therefor.

When inserts are folded several times to conform to the size of the printed record, stubs should be inserted at the binding side of the record to equalize the space occupied by the folds. Unmounted photographs should be used when copies of such are required in printed records.

As this rule is intended primarily for the guidance of the printer his attention should be directed thereto before the record or brief is printed.

A sample copy of a printed record will be furnished by the clerk of this court on application therefor.

Records and briefs not printed in substantial conformity with the provisions of this rule will not be accepted or filed.

(Promulgated March 30, 1911.)

**Ninth circuit—FORM OF PRINTED RECORDS, ARGUMENTS, BRIEFS, AND PETITIONS FOR REHEARING.** 1. All records printed for the use of the court must be printed on unruled white writing paper,  $9\frac{1}{2}$  inches long and  $6\frac{1}{4}$  inches wide. The printed page, exclusive of any marginal note, reference, or running head, must be 7 inches long and 4 inches wide, excepting in patent cases where counsel furnish to the clerk at the time of docketing the cause patent office drawings and specifications for insertion. In such cases the margin of the record may be sufficiently enlarged to accommodate such drawings and specifications. The record must be properly indexed. Pica double leaded is the only mode of composition allowed.

2. All arguments, briefs, and petitions for rehearing, printed for the use of the court, must be printed on unruled white writing paper,  $9\frac{1}{2}$  inches long and  $6\frac{1}{4}$  inches wide. The printed page exclusive of any marginal note, reference, or running head, must be 7 inches long and 4 inches wide. Pica double leaded is the only mode of composition allowed.

[In the seventh circuit there is no rule corresponding with rule 26 as adopted in the other circuits.]

## 27.

### Copies of Records and Briefs.

**First, second, third, fifth, sixth, eighth, and ninth circuits**—The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

[In the seventh circuit there is no rule corresponding with rule 27 as adopted in the other circuits.

In the eighth circuit the rule is the same as given above, except that, as promulgated March 30, 1911, the following words are inserted after the words "The clerk shall:" "cause to be bound in volumes in a substantial manner and shall."]

**Fourth circuit**—The clerk shall cause to be bound two copies of the printed record in every case, and of all printed motions, briefs and arguments filed therein; one copy to be carefully preserved in his office, and one copy for the use of the court library. The cost of the same to be paid for by the clerk out of the revenues of his office.

(Promulgated April 1, 1912.)

## 28.

### Opinions of the Court.

**First, second, fifth, seventh, eighth, and ninth circuits**—1. All opinions

delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records, but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

[In the eighth circuit, sections 1 and 2 of this rule are as given above, and section 3, as promulgated March 30, 1911, is slightly changed to read as follows:

3. Opinions printed or prepared under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed or original opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.]

**Fourth circuit—1.** All opinions delivered by the court shall be printed under the supervision of the judge delivering the same, or of one of the circuit judges, the cost of such printing to be paid by the clerk out of the revenues of his office and charged to the litigants in the respective cases, to be taxed and allowed as other costs.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. The clerk of this court shall from time to time cause two sets of the printed opinions of this court to be bound in a substantial manner into volumes, one set to be kept in the clerk's office and one set to be kept in the court library.

**Sixth circuit—1.** All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The opinions of the court shall be printed under the supervision of the clerk by the printer to whom the court printing has been awarded in accordance with paragraph 7, rule 23.

3. Opinions printed under the supervision of the clerk need not be copied into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

4. The cost of printing the opinions shall be defrayed out of the amount received for the same, and any deficit shall be paid out of such fees collected by the clerk as are not properly taxable as costs in any case pending in the court.

[As amended October 22, 1894, July 6, 1897.]

[In the third circuit this rule is the same as in the first circuit as above given, except that the first section reads as follows:

"1. All written opinions delivered by the court shall be delivered to the S. S. at L.—20.

clerk and recorded," and the second section is omitted, and the third section is marked "2."

In the seventh circuit rule 26 corresponds with and is the same as rule 28 in the first circuit as above given.

Subdivision 2 of rule 28, ninth circuit, was amended March 2, 1900, by adding thereto, "and when so filed they shall be deemed to have been recorded within the meaning of this rule."]

## 29.

### REHEARING.

**First, second, and third circuits**—A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines.

[This rule was amended October 4, 1898, in the first circuit so as to read: A petition for a rehearing after judgment may be filed at the term at which the judgment is entered, and within one calendar month after such entry, and not later, unless by leave granted during the term. It must be in print, in the form and style required by rule 26, and it must briefly and distinctly state its grounds, and be supported by a certificate of counsel. It will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines. Provided, whenever a judgment is entered within less than a month before the term adjourns, the petition may be filed within a month after the entry of judgment, and with the same effect after the term as though filed before the adjournment.]

**Fourth circuit**—A petition for rehearing can be presented only within thirty days after judgment is entered, unless by special leave granted during the term the judgment was entered; and must be printed, and briefly and distinctly state its grounds, and be supported by a certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determine. But such petition shall not operate to stay the mandate or other process provided for in rule 32, except by special order of the court.

(Promulgated April 1, 1912.)

**Fifth circuit**—A petition for a rehearing after judgment can be presented only during the term at which judgment is entered, and within twenty days after such entry, unless by special leave granted by the court, and must be printed and briefly and distinctly state its grounds without argument, and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

[As amended February 27, 1894.]

[This rule was amended January 12, 1905, by inserting after the words "special leave granted by the court," the words "or one of the judges."]

**Sixth circuit**—"A petition for rehearing after judgment can be presented only within thirty days after the day when the printed opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days"—and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

[As amended June 22, 1893, and subsequently.]

**Eighth circuit**—1. A petition for rehearing may be presented and filed within sixty days after the date of the judgment or decree, and jurisdiction to hear and decide the questions presented thereby is reserved, notwithstanding the lapse of the term within the sixty days.

2. Such petition for rehearing must be printed and twenty copies thereof filed with the clerk and must briefly and distinctly state its grounds, and be supported by a certificate of counsel, and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

(Promulgated March 30, 1911.)

**Ninth circuit**—A petition for rehearing may be presented within fifteen days after judgment. It must be printed, and briefly and distinctly state its grounds, be supported by certificate of counsel that in his judgment it is well founded, and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

[In the seventh circuit rule 27 corresponds with rule 29 in the other circuits and is as follows:

A petition for rehearing must be filed within thirty days after entry of judgment or decree or after filing of the opinion, shall be in print and be served forthwith by copy upon the opposing party, who within twenty days from such service, may file a printed answer and the petition shall be determined without oral arguments, unless otherwise ordered. If a petition be not filed within the time allowed or upon the overruling of a petition, the clerk shall, without special order, issue the mandate of the court to the court below. Twenty copies of such petition or answer shall be filed with the clerk of this court.]

## 30.

### INTEREST.

**First, third, and sixth circuits**—1. In cases where a writ of error is prosecuted in this court and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court and shall appear to have been sued out

merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

[In the second, fourth, fifth, eighth, and ninth circuits, the rule is the same as that in the first circuit as above given except that the words "or territory" are inserted after the word "state" and before the word "where" in the first section thereof, and in the seventh circuit, rule 28 corresponding with rule 30 in the other circuits, is substantially the same as rule 30 in the first and third and sixth circuits.

### 31.

#### COSTS.

See also Supreme Court Order, ante p. 253.

**First, second, fourth, and fifth circuits—**1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the supreme court.

[In the third circuit the rule is the same as in the first as above given, except that the table of fees and costs was amended January 10, 1898, so as to read as follows:

Ordered, In pursuance of the act of Congress of February 19, 1897 (29 Stat. at L. 536, chap. 263), that the following table of fees and costs in the circuit courts of appeals be, and the same is hereby, established to take effect on the first day of March, A. D. 1898, and no other fees and costs than those therein named shall thereafter be charged:

Docketing a case and filing the record .....	\$5 00
Entering an appearance .....	25

Transferring a case to the printed calendar .....	\$1 00
Entering a continuance .....	25
Filing a motion, order, or other paper .....	25
Entering any rule, or making or copying any record or other paper, for each 100 words .....	20
Entering a judgment or decree .....	1 00
Every search of the records of the court and certifying the same ..	1 00
Affixing a certificate and a seal to any paper .....	1 00
Receiving, keeping, and paying money, in pursuance of any statute or order of court, one per cent on the amount so received, kept, and paid .....	
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies for each printed page of the record and index .....	25
Making a manuscript copy of the record, when required by the rules, for each 100 words (but nothing in addition for supervising the printing) .....	20
Issuing a writ of error and accompanying papers, or a mandate or other process .....	5 00
Filing briefs, for each party appearing .....	5 00
Copy of an opinion of the court, certified under seal, for each printed . page (but not to exceed \$5 in the whole for any copy) .....	1 00
Attorney's docket fee .....	20 00

In the fourth circuit, sections 1 and 2 of this rule are the same as given above; and section 3 is the same down to, and including, the words "transcript of the record," in the second sentence, and the remaining part of the section as promulgated April 1, 1912, reads as follows: "And proofs from the court below, and the expense of printing the same, when printed below, shall be taxable in that court as costs in the case. The expense of printing, however, shall be taxed at actual cost (to be shown by the affidavit of the printer), but in no event to exceed twenty cents per folio of one hundred words."

In section 5, the words "in detail," at the end of the section, do not appear in the promulgation of April 1, 1912. And the following section is added by the promulgation of April 1, 1912:

7. The following table of fees and costs, established under the act of Congress of February 19, 1897 (29 Stat. 536, c. 263), shall remain and continue in effect with the promulgation of these rules:

(The table of fees and costs is the same as given above.)

In the sixth circuit the rule is the same as that in the first as given above, except that a paragraph was added thereto by amendment July 6, 1897, as follows:

7. In pursuance of the act of February 19, 1897, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record .....	\$4 00
For entering an appearance .....	20
For entering a continuance .....	20
For filing a motion, order, or other paper .....	20
For entering any rule, or for making or copying any record or other paper, per folio of each 100 words .....	15
For transferring each case to a subsequent docket and indexing the same .....	80
For entering a judgment or decree .....	80
For every search of the records of the court .....	80
For a certificate and seal .....	1 50

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent on the amount so received, kept, and paid .....	10 00
For an admission to the bar and certificate under seal .....	10 00
For preparing the record for the printer, indexing the same, supervising the printing, and distributing the printed copies to the judges, the reporter, and the parties or their counsel, a printed page ..	20
For issuing a writ of error and accompanying papers .....	4 00
For a mandate or other process .....	4 00
For filing briefs, for each party appearing .....	4 00
For every copy of any opinion of the court, or of any judge or justice thereof, certified under seal, \$1 for every printed page, but not to exceed \$5 in the whole for any copy.	
For certifying a printed transcript of a record in this court or parts thereof, a printed page .....	20
For certifying a manuscript transcript of a record in this court or a part thereof, a folio .....	15
For furnishing a printed transcript of the record uncertified to other persons than the parties or their counsel of record, for each one hundred pages or fraction thereof .....	2 50

In the seventh circuit rule 29 corresponds with rule 31 in the other circuits, and is as follows:

1. When any suit shall be dismissed in this court, except for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In every case of a judgment or decree affirmed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In every case of reversal of a judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The costs of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. No costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and to annex to the same the bill of items taxed in detail.

6. In all cases certified to the Supreme Court, or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

In the eighth circuit the rule is the same as that in the first as above given, except that the clause, "except where the dismissal is for want of jurisdiction," is omitted from the first section thereof; and section 3 is the same as above down to the end of the first sentence. The remainder of the section, as promulgated March 30, 1911, reads as follows: "Where the record has been printed in this court under the provisions of sections one and two of rule 23, the cost of printing thirty copies of the transcript of record from the court below shall be taxed as costs in the case, unless otherwise ordered by this court, but no allowance shall be made for the amount paid to the clerk of the court below for the written or type-written transcript of the record. Where the record has been printed in the court below and a copy of such printed record certified to this court the cost of printing twenty-five copies of such record or portion thereof shall be taxable as costs in the case in the court below, unless otherwise ordered by this court."

And the following passage is added to section 6: "except that no fee

shall be charged or collected for any printed record or portion thereof, required by law to be used by the clerk in the preparation of such transcript of the record."

In the ninth circuit the rule is the same as in the first circuit as above given, except that a section is added thereto as follows:

"7. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of any bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively to compel payment of said fees."]

### 32.

#### MANDATE.

**First, second, third, and fourth circuits**—In all cases finally determined in this court, a mandate, or other proper process in the nature of a procedendo, shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

[This rule was amended in the first circuit October 4, 1898, by adding thereto the following paragraph: Such mandate, or other process, may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after two calendar months from the entry of judgment, unless a petition for a rehearing has been filed and remains undisposed of.

In the fourth circuit this rule is the same as given above, except that the words "on the order of this court" do not appear in the promulgation of April 1, 1912, and the following passage is added at the end: "Such mandate, or other process, may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after the expiration of thirty days from the date of the judgment or decree."

**Fifth circuit**—Mandates shall issue at any time after twenty-one days from the date of the decision, unless an application for a rehearing has been granted or is pending. A copy of the opinion of this court shall accompany the mandate when a new trial or further proceedings are to be had in the lower court, and the charge for such copy shall be taxed in the costs of the case.

Provided, that in all cases entitled to precedence in this court under § 7 of the act approved March 3, 1891, and amendments thereto, the mandate or other proper process shall issue after the expiration of seven days from the date of the decision, unless otherwise ordered by the court or one of the judges.

[As amended January 12, 1905.]

**Sixth circuit**—In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Such mandate shall not issue until time has elapsed for filing a petition

to rehear as defined by rule 29; and no mandate or other process of procedendo shall issue when a petition to rehear is pending, unless specially ordered.

Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case.

Ninth circuit—In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo, at the request of counsel for the prevailing party and upon the payment of any costs due in the case, shall be issued, as of course from this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of the court, shall be issued on the expiration of fifteen days from the date of such final determination, unless within said time a petition for rehearing be filed, in which case the mandate shall not issue until after the determination of such petition.

[In the seventh circuit, rule 30, corresponding with rule 32 of the other circuits, is the same as rule 32 of the first circuit as above given.

In the eighth circuit the rule is the same as that in the first circuit as above given, except that there is a note appended thereto, as follows:

Note.—By an order entered March 30, 1911, the clerk is directed to issue a mandate or other proper process, to the court below, in all cases, 60 days after the final disposition thereof, except in cases where it shall be otherwise expressly ordered.]

### 33.

#### CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

[Rule 31 in the seventh circuit.]

### 34.

#### MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

First, third, fourth, fifth, sixth, eighth, and ninth circuits—1. Models,

diagrams, and exhibits of material, forming part of the evidence taken in the court below, in any case pending in this court on writ of error or appeal, shall be placed the custody of the marshal\* of this court at least ten days before the case is heard or submitted.

2. All models, diagrams, and exhibits of materials, placed in the custody of the marshal\* for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal\* to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

**Second circuit**—Sec. 1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court on writ of error or appeal, shall be placed in the custody of the clerk of this court at least ten days before the case is heard or submitted.

Sec. 2. All models, diagrams, and exhibits of material placed in the custody of the clerk for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the clerk to notify the counsel in the case by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

[As amended February 13, 1895.]

[\*In the fourth circuit the word "clerk" is used in the promulgation of April 1, 1912, instead of the word "marshal," as above.

In the seventh circuit, rule 32 corresponds with rule 34 in the other circuits, and is the same as rule 34 in the first circuit as above given.]

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ADDITIONAL RULES, UNITED STATES CIRCUIT COURT OF  
APPEALS.

Second Circuit.

35.

ALLOWING APPEAL OR WRIT OF ERROR; BAIL.

1. An appeal or writ of error from a circuit court or a district court in the cases provided for in sections 6 and 7 of the act entitled "An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891, and acts to amend said act approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by any circuit judge within the

circuit, or by any district judge within his district and the proper security be taken and the citation be signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error to this court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

Wm. J. Wallace,

[Adopted May 3, 1897.]

E. H. Lacombe,

H. Shipman.

### 36.

#### FEES.

In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking with the clerk, for the payment of his fees, or otherwise satisfy him in that behalf.

At the expiration of ten days after a case has been decided, the order or decree thereon will be entered by the court, and the clerk will thereupon prepare and tax the bill of costs and issue the mandate. Within said ten days the parties may file with the clerk their proposed orders or decrees and bills of costs, with proof of service of the same upon the opposing attorneys.

#### Fourth Circuit.

### 35.

#### SATURDAYS CONFERENCE DAYS.

The clerk in making his docket shall not set down for argument any cause for any Saturday of the term for which such docket is intended, and this court will meet on said days for consultation only.

### 36.

#### BANKRUPTCY.

1. Upon the filing of the petition for review as provided for in § 24b of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, the clerk of this court shall docket the cause, and shall forthwith serve a certified copy of the petition upon the respondent or respondents, or his or their solicitor, through the mail or otherwise, together with a notice to the respondent or respondents to answer, demur, or move to dismiss the said petition, within fifteen days from the date of such notice.

2. The petitioner shall cause a certified printed transcript of the record

and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court within forty days from the date of the filing of his petition for review.

3. By consent of all parties to the cause, by stipulation in writing filed with the clerk of this court, the petitioner may cause a transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court in lieu of a certified printed transcript as above mentioned, and thereupon the clerk of this court shall cause the record to be printed as provided in the 23rd rule of this court, and furnish counsel on both sides with three copies each.

4. And such causes shall stand for hearing in their regular order. But either side may, upon ten days' notice given to the opposing counsel, have the cause heard, either at term time, or in vacation, or in chambers, upon the briefs, unless at its own suggestion, or for good cause shown, the court shall order oral argument.

5. The all causes coming up by appeal as provided in § 25 of said bankruptcy act shall stand for hearing in this court, either in term time or in vacation, and may be called up by either party upon ten days' notice, as provided in § 4 of this rule.

6. All rules of this court (except as herein modified) shall apply to the proceedings in bankruptcy to which this rule relates.

7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other order suitable to expedite the proceeding or to prevent injustice.

(Promulgated April 1, 1912.)

37.

The foregoing rules shall be in force on and after April 1st, 1912.

Fifth Circuit.

35.

ORDER IN RELATION TO ASSIGNMENT OF CASES FOR HEARING.

Unless otherwise ordered by the senior circuit judge, thirty days prior to the opening of a regular session of this court the clerk is directed to assign cases for hearing as follows:

At Atlanta, Georgia, four cases per day for the first three days of each week;

At Montgomery, Alabama, four cases per day for the first three days of each week;

At Fort Worth, Texas, four cases per day for the first three days of each week.

At New Orleans, Louisiana, two cases per day for the first three days of each week.

The above assignments shall be made in accordance with existing law regulating the return of appeals, writ of error, and other appellate proceedings in the fifth judicial circuit, provided that cases entitled by law to preference in hearing and bankruptcy cases shall be first assigned, and cases, whether preference or not, may, upon stipulation of the parties filed with the clerk, be assigned for hearing at any other place or session of this court designated in such stipulation.

Except as hereinabove provided, the assignment of cases at New Orleans, Louisiana, shall be grouped by States, so as to permit the hearing of cases from one State before the cases from the next State in order shall be called.

[As amended January 12, 1905.]

### 36.

#### ASSIGNMENT OF JUDGES.

It is ordered that whenever a full bench of three judges shall not be made up by the attendance of the associate justice of the Supreme Court assigned to the circuit, and of the circuit judges, so many of the district judges, in the order of the seniority of their respective commissions and qualified to sit, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court; provided, however, that the court may at any time, by particular assignment, designate any district judge to sit as aforesaid.

[Adopted June 23, 1892.]

### 37.

#### WRITS OF ERROR IN CRIMINAL CASES.

1. Writs of error to review criminal cases tried in any district or circuit court of the United States within this circuit, which may be reviewed under the provisions of the act of March 3, 1891, creating this court, and the act of Congress amendatory thereof, approved January 20, 1897, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, by either of the circuit judges, or by any district judge who presided on the trial, and the proper security be taken, and the citation be signed by him, and he may also grant a supersedeas and stay of execution or proceedings pending the determination of such writ of error.

2. Where such writ of error is allowed in any criminal case as aforesaid, the circuit court or district court before which the accused was tried, or the trial judge, or the circuit justice assigned to the circuit, or either of the circuit judges, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be

fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

[Adopted June 11, 1897.]

Appendix to Rule 37.

[Form of Appearance Bond on Writ of Error in Criminal Cases.]

Know all Men by these Presents:

That we, ..... as principal, and ..... as sureties, are held and firmly bound unto the United States of America in the full and just sum of ..... dollars, to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ..... day of ....., in the year of our Lord one thousand eight hundred and ninety.....

Whereas, lately at the ..... term, A. D. 189.., of the ..... Court of the United States for the ..... District of ..... in a suit pending in said court, between the United States of America, plaintiff, and ..... defendant, a judgment and sentence was rendered against the said ....., and the said ..... has obtained a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, at the City of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said ..... shall appear in the United States Circuit Court of Appeals for the Fifth Circuit, on the first day of the next term thereof, to be held at the City of ..... on the first Monday in ....., A. D. 189.., and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said ..... court against him shall be affirmed by the said United States Circuit Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue, and effect.

..... [Seal]

..... [Seal]

..... [Seal]

Approved:

.....  
Judge of the .....

Sixth Circuit.

35.

TESTIMONY IN ADMIRALTY CASES AFTER APPEAL.

In admiralty appeals no testimony shall be taken except under a com-

mission issued from this court to a clerk of a United States court or a United State commissioner, by direction of the court, the circuit judge, qualified to sit on appeal in such case, after cause shown to such court, justice, or judge that such evidence is material and necessary, and could not by due diligence have been produced at the original hearing. Such testimony shall be taken only upon interrogatories settled by such court, justice, or judge; upon at least ten days' previous notice to the opposing party or his attorney (accompanied with a copy of the proposed interrogatories) and upon cross-interrogatories to be settled at the same time after five days' previous notice of the same, with copy thereof to be served upon counsel offering testimony.

[Promulgated June 22, 1893.]

### 36.

#### DISPOSITION OF FEES NOT COSTS IN CASES.

All fees collected by the clerk which are not properly taxable as costs in any case pending in the court and which are not by law required to be deposited by him in the treasury of the United States, after the payment of any deficit arising from the printing of opinions, shall constitute a fund to be expended in the purchase of law books for the library of the court by the clerk, under the direction of the court. And it shall be the duty of the clerk to render to the court for its examination and approval a quarterly account of such fees received and disbursed by him.

[Promulgated October 2, 1894.]

### 37.

#### CALL AND ORDER OF THE DOCKET.

1. The court on the first day of each calendar session will begin calling the cases for argument in the order in which they stand on the docket and proceed from day to day during the session in the same way. If the parties or either of them shall be ready when the case is called, the same will be heard, and if neither party shall be ready to proceed with the argument, the case will be continued to the next calendar session.

2. Each day's calendar shall consist of the six cases next in order after the case last submitted on the previous day, but the calendar will not include any case continued or passed by the court or stipulation of counsel before the adjournment of court on the previous day. The calendar for each day shall be exhibited in the clerk's office at the adjournment of court on the previous day. Counsel choosing to rely on the judgment of the clerk as to the probable time of the hearing of any case, otherwise than as shown in the day's calendar above provided for, must do so at their own risk.

3. Two or more cases involving the same question may by leave of the court be heard together, but they must be argued as one case.

[Promulgated Oct. 22, 1894.]

38.

ALLOWING APPEAL OR WRIT OF ERROR; BAIL.

1. An appeal or writ of error from a circuit court or a district court to this court in the cases provided for in §§ 6 and 7 of the act entitled "An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891, and acts to amend said act approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by either circuit judge within the circuit or by any district judge within his district, and the proper security be taken, and the citation be signed by him; and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error to this court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

[Promulgated March 2, 1897.]

Seventh Circuit.

33.

CLERK'S REPORTS.

The clerk shall keep an accurate account of all moneys received by him for fees in cases pending in the court, and shall deposit the same in a national bank to be designated by the senior circuit judge. And as often as once in three months he shall submit to the court a detailed report showing all moneys received by him for fees since the last report, and all moneys paid out, if any.

34.

CLERK.

All fees collected by the clerk, which are not properly taxable as costs in any case, and which are not by law required to be deposited in the Treasury of the United States, after the payment of any deficit arising from the printing of opinions, shall constitute a fund to be expended in the purchase of law books for the library of the court, by the clerk under the direction of the court.

It shall be the duty of the clerk to render to the court for its examination and approval a quarterly account of such fees received and disbursed by him.

**Eighth Circuit.****35.****WRITS OF ERROR IN CRIMINAL CASES.**

1. Writs of error to review criminal cases tried in any district or circuit court of the United States within this circuit, which may be reviewed under the Judicial Code, approved March 3, 1911, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, or by either of the circuit judges within this circuit, or by any district judge within his district, and the proper security be taken, and the citation signed by him, and he may also grant a supersedeas and stay of execution or proceedings, pending the determination of such writ of error.

2. Where such writ of error is allowed in the criminal cases aforesaid, the district court before which the accused was tried, or the district judge of the district wherein he was tried, within the district, or the circuit justice assigned to the circuit, or either of the circuit judges within the circuit shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

(Promulgated March 30, 1911.)

**36.****PETITIONS TO REVISE.**

A petition to revise, under the provisions of § 24b of the bankruptcy law approved July 1, 1898, shall be filed and docketed as an original action in this court, and be entitled "....., Petitioner, v. ...., Respondent," and shall specifically designate the respondent or respondents upon whom the petitioner desires notice to be served, and a sufficient number of copies of such petition shall be furnished the clerk at the time of filing so that a copy may be served upon each of the respondents.

**37.****ORDER OF COURT.**

1. Before the filing of a petition to revise, the same shall be presented to the court, or one of the circuit judges, for leave to file same and for an order fixing the return day to the notice required by law.

2. When such petition is accompanied by a written consent that the petition to revise may be filed and a waiver by the respondent or respondents, or their counsel, of such notice, no notice will be issued. In such cases the case will be docketed by the clerk.

## 38.

## NOTICE.

The notice to be given, as provided by law, shall be issued by the clerk of this court, under the seal thereof, and shall be addressed to the respondent or respondents and be served by the marshal unless an acknowledgment or acceptance of service thereof is made by the respondent or respondents or their counsel.

## 39

## RESPONSE.

The response to the petition, when the respondent elects to make a written response, shall be filed within thirty days after the service of the notice or the filing of a waiver thereof.

## 40.

## PRINTING OF RECORD.

1. The clerk shall cause the petition and exhibits thereto, if any, and the order, notice and response, if any, to be printed as soon as convenient after the response is filed or the time for filing such response has expired, and shall distribute the printed copies of same to counsel for the respective parties, as soon as the same are printed.

## 41.

## BRIEFS AND ARGUMENTS.

Twenty copies of the brief and argument in behalf of petitioner shall be printed, and filed ten days before the day set for the hearing, and twenty copies of the brief and argument for the respondent or respondents shall be printed, and filed eight days before the day of hearing.

## 42.

## HEARING.

1. Petitions to revise filed in vacation shall be assigned by the clerk for hearing in their regular order at the next session or term of the court in the same manner as appeals and writs of error in other cases.
2. Petitions to revise filed during a session of the court, when a sufficient showing of urgency is presented, may be set for hearing at that term and upon such terms and conditions as the court may direct.
3. Petitions to revise assigned by the clerk in their regular order as S. S. at L.—21.

provided in § 1 of this rule, when such assignment is for a day near the close of the session, may be advanced by order of the court and set for an earlier day, upon good cause shown therefor by either of the parties.

43.

COSTS.

1. The costs and fees now provided by law in cases upon appeal or writ of error shall, so far as the same are applicable, be taxed on petitions to revise.
2. Upon the determination of a petition to revise, such order as to costs will be made as the court may deem necessary.

44.

PROCEDENDO.

1. In all cases on a petition to revise, wherein the action or decree of the district court complained of is disapproved by this court, the clerk shall, at the expiration of ten days from and after the date of entering the decree in this court, issue process in the nature of a procedendo to the said district court, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such district court in conformity with the decree of this court.
2. In all cases on petition to revise, wherein the action or decree of the district court complained of is approved or confirmed, or said petition dismissed by this court, the clerk shall at the expiration of thirty days certify a copy of such decree to the district court.

45.

APPEALS AND WRITS OF ERROR IN BANKRUPTCY CASES.

The appeals and writs of error provided for by § 25 of the bankruptcy law, approved July 1, 1898, shall be governed by the same rule and regulations as to costs and procedure as are provided by this court for appeals and writs of error in other cases.

## ADDENDA.

[Form of Writ of Error for use in the United States Circuit Court of Appeals, Eighth Circuit.]

United States of America, ss.

The President of the United States of America,

To the Honorable Judges of the 1.....

Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said .....Court, before you, at the .....Term, 19....., thereof, between 2 ..... a manifest error hath happened, to the great damage of the said 3 ..... as by ..... complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 4..... day of ..... 19...., to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this ..... day of ..... in the year of our Lord one thousand nine hundred .....

Issued at office in ..... with the seal of the 5..... and dated as aforesaid.

Clerk of .....

Allowed by .....

..... Judge.

Notes.—<sup>1</sup>Here insert correct name of the court to which the writ is addressed and whose judgment is to be reviewed.

<sup>2</sup>Here insert correct style of cause, showing who was plaintiff and who defendant in court below.

<sup>3</sup>Here insert name of party who sues out writ of error.

<sup>4</sup>Rule 14, subd. 5, requires writs of error and appeals to be made returnable sixty days after citation is signed. This blank must be filled accordingly, naming a day not more than sixty days after the date of the citation.

<sup>5</sup>This blank should be so filled as to show whether the writ is issued by the clerk of a United States circuit court or by the clerk of the circuit court of appeals.

[Form of Return to be Indorsed on Writ of Error by the Clerk of the Court to which the Writ is Addressed.]

UNITED STATES OF AMERICA, }  
..... } ss.

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of<sup>6</sup>

Clerk of .....  
.....

[Form of Citation.]

**United States of America,**

To ..... Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, 60 days from and after the day this citation bears date, pursuant to 1 ..... filed in the Clerk's Office of the 2 ..... wherein ..... is 3 ..... and you are 4 ..... to show cause, if any there be, why the 5 ..... rendered against the said 6 ..... as in said 7 ..... mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable ..... Judge of .....  
..... this ..... day of .....  
A. D. 19....  
..... Judge of .....

**6** Here describe the court to which the writ is addressed.

<sup>1</sup> Insert (a writ of error) or (an appeal allowed and).

<sup>2</sup> Insert name of court to which writ of error is addressed, or from which appeal is allowed.

<sup>8</sup> Insert plaintiff in error or appellant.

**4 Insert defendant in error or appellee.**

**5 Insert judgment or decree.**

**8 Insert plaintiff in error or appellant.**

**7 Insert writ of error or appeal.**

## [Form of Supersedeas or Cost Bond.]

Know All Men By These Presents,

That we, ..... are held and firmly bound unto ..... in the full and just sum of ..... to be paid to the said ..... heirs, executors, administrators, successors, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals, and dated this ..... day of ..... in the year of our Lord one thousand nine hundred .....

WHEREAS, lately at the ..... term of the ..... in a suit depending in said court between ..... plaintiff, and ..... defendant, ..... was rendered against the said ..... and the said ..... has obtained ..... of the said Court to reverse the ..... in the aforesaid suit, and a citation directed to the said ..... citing and admonishing ..... to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said ..... shall prosecute said ..... to effect, and answer all damages and costs if ..... fail to make good ..... plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

..... [Seal.]

..... [Seal.]

..... [Seal.]

Approved by

[The foregoing bond and citation is adapted for appeals in equity cases as well as in cases of writs of error in actions at law.]

## [Form of Appearance Bond on Writ of Error in Criminal Cases.]

Know All Men By These Presents,

That we, ..... as principal, and ..... as sureties, are held and firmly bound unto the United States of America in the full and just sum of ..... Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents.

Sealed with our seals and dated this ..... day of ..... in the year of our Lord, One Thousand Nine Hundred .....

WHEREAS, lately at the ..... Term, A. D. 190....., of the .....

..... Court of the United States for the ..... District of ....., in a suit depending in said Court between the United States of America, plaintiff, and ..... defendant, a judgment and sentence was rendered against the said .....  
..... and the said ..... has obtained a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said ..... shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed; or the writ of error or appeal is dismissed; and if he shall appear for trial in the ..... Court of the United States for the ..... District of ..... on such day or days as may be appointed for a retrial by said ..... court and abide by and obey all orders made by said court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit; then the above obligation to be void, otherwise to remain in full force, virtue, and effect.

..... [Seal.]

..... [Seal.]

..... [Seal.]

Approved:

.....

Judge of the .....

Ninth Circuit.

35.

#### ASSIGNMENT OF CAUSES FOR HEARING.

1. Thirty days prior to the opening of any calendar session of the court, the clerk is directed to assign causes for hearing at the rate of one case for each Monday, and two cases per day for the following four days of each week. Causes shall be grouped by states, and assignments made, so as

to permit the hearing of causes from one state before the causes from the next state in order shall be called; causes from the northern district of California shall be assigned for hearing last. Any causes entitled by law to preference in hearing shall be first assigned and take precedence over other causes from the same state.

2. A stipulation to continue a case to the foot of the calendar or in any way change the day assigned for hearing, will not be recognized as binding upon the court and no such change will be made except by order of the court for reason shown.

3. Ten days before each calendar session of the court the clerk shall prepare and cause to be printed a calendar of the causes assigned for the approaching session.

### 36.

#### TERMS AND SESSIONS OF THE COURT.

1. One term of this court shall be held annually on the first Monday of October and adjourned sessions on the first Monday of each month in the year. All sessions shall be held at San Francisco, unless otherwise especially ordered by the court.

2. The October, February, and May sessions shall be known as calendar sessions, and shall be sessions for the trial of all causes that shall have been placed upon the calendar in pursuance of rule 35.

3. A term of this court shall be held annually in the city of Seattle, in the state of Washington, and in the city of Portland, in the state of Oregon. The Seattle term shall be held beginning upon the second Monday in September, and the term at Portland shall be held beginning upon the third Monday in September. All appeals and writs of error from the circuit and district courts for the district of Washington, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Seattle, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said circuit and district courts for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Seattle. All appeals and writs of error from the circuit and district courts for the district of Oregon, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Portland, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said circuit and district courts for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Portland. Appeals and writs of error from the circuit and district courts for the districts of Idaho and Montana may, upon the stipulation of the parties thereto, be heard at the annual term to be held either at Seattle or Portland.

[As amended October 20, 1899.]

## 37.

## CERTIFICATION OF PRINTED MATTER.

In all cases taken to the Supreme Court, or otherwise where printed matter is certified, the fees of the clerk of this court for certifying to such printed matter are hereby fixed at the rate of 10 cents per folio of one hundred words.

## 38.

## PHOTOGRAPHS OF CHINESE TO BE ATTACHED TO BAIL BOND.

Whenever, in cases of deportation of Chinese, the defendant be admitted to bail pending appeal before the bond be approved and the party released from custody, a photograph of the defendant shall be attached to said bond.

(Promulgated October, 1902.)

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